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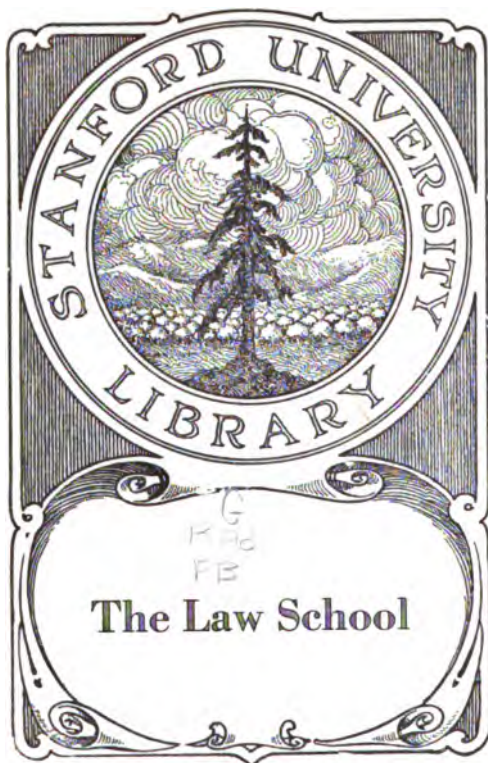
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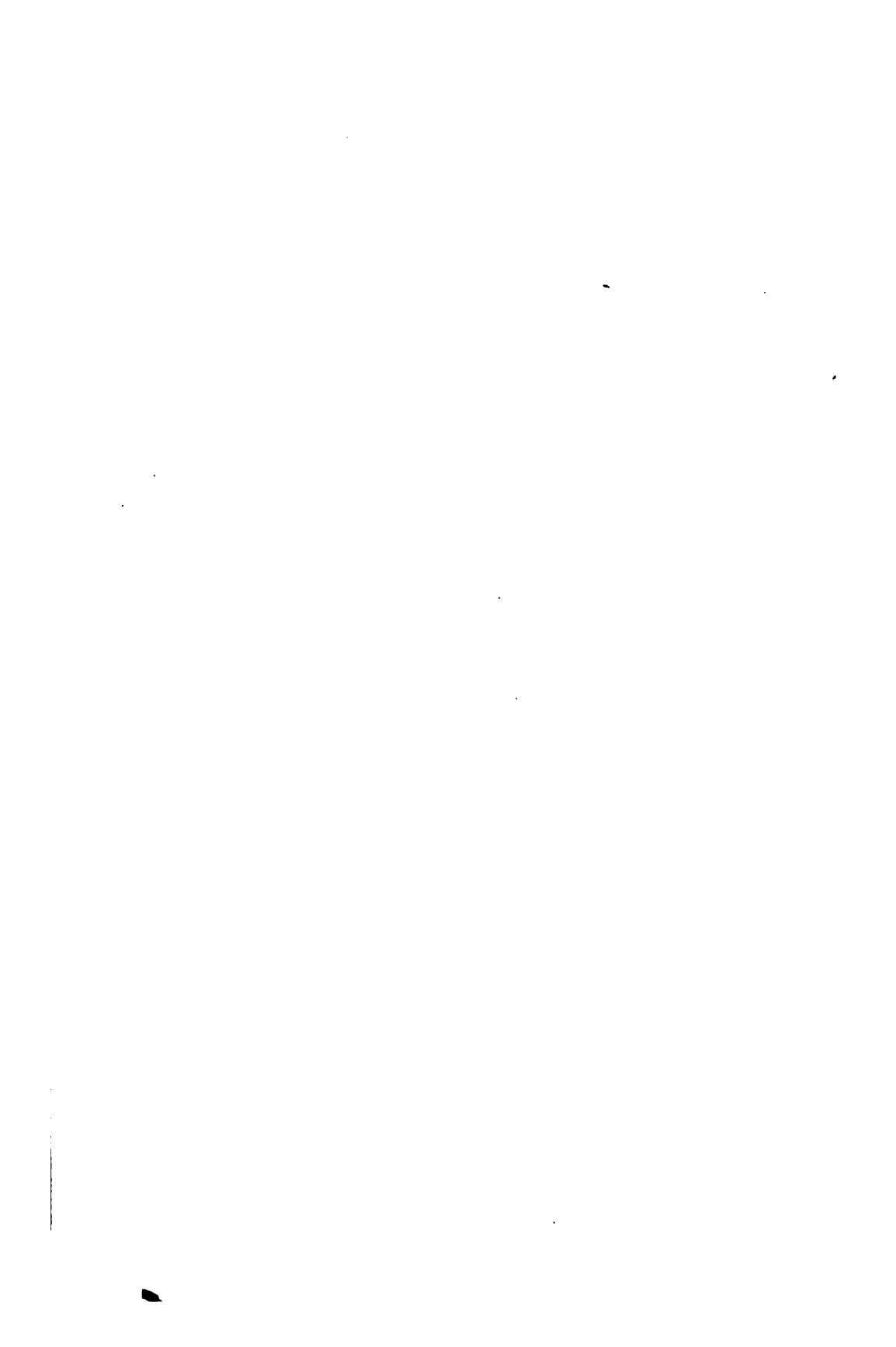
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FOREWARD

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CALIFORNIA LEGAL RECORD

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**Decisions of the Supreme Court of California
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Volume I

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DENNIS & CO., INC.

Buffalo, N. Y.

June, 1943

CALIFORNIA LEGAL RECORD.

A WEEKLY JOURNAL

CONTAINING

All the Decisions of the Supreme Court of California.

ALSO

**IMPORTANT DECISIONS OF OREGON AND NEVADA, AND OF THE
UNITED STATES CIRCUIT AND DISTRICT COURTS OF CALI-
FORNIA; ALSO OF THE UNITED STATES SUPREME COURT
AND COURTS OF LAST RESORT IN OTHER STATES;
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DEPARTMENT OF THE INTERIOR.**

The Only Weekly Containing All the Decisions of the Supreme Court of California.

VOLUME I.

(Continuation from "San Francisco Law Journal," Vol. 1.—Whole Series, Vol. 2.)

FROM MARCH TO OCTOBER, 1878

SAN FRANCISCO:
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AUG 30 1943

Supreme Court of California.

W. T. WALLACE, Chief Justice.

Associate Justices:

J. B. CROOKERY,
E. W. MCKINSTRY,

A. C. NILES,
A. L. BRIDGES.

Oldean J. Carpenter.....Reporter
Jo Hamilton.....Attorney-General.
D. B. Woolf.....Clerk.
John P. Poole.....Deputy Clerk, Sacramento.
H. P. Bush.....Deputy Clerk, San Francisco.
T. D. Mott.....Deputy Clerk, Los Angeles.
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COURT MEETS:

At San Francisco—second Monday in January
and July, at 640 Clay Street, corner of Kearney.

At Sacramento—Second Monday in May and No-
vember, in the State House.

At Los Angeles—Second Monday in April and
October, in the Hallman-Masareal Block.

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CALIFORNIA LEGAL RECORD.

VOL. I.

MARCH 30, 1878.

No. 1

Salutatory.

608 WASHINGTON STREET, SAN FRANCISCO, March 30, 1878.

A year ago, while traveling southwardly through the State, business observations and circumstances fully convinced us of the necessity felt by the legal profession at large for a good law periodical on this Coast. We received many voluntary and earnest assurances that such a work would be most cordially received and liberally supported soon as known—and all this repeated in many widely separated localities.

We determined it should be tried,—but while making arrangements, learned for the first time that the *San Francisco Law Journal* had just entered the field. We joined its fortunes,—a name, with some debt, and a few hopeful subscribers—established an office with the proper material and outfit,—and by close and persistent effort, aided in placing it on a better and more paying basis. The name was changed on March 1st, at the opening of its second volume and four more pages added, and we earnestly hoped for a wider and higher success.

But disagreements have arisen, and though we have most earnestly striven to keep the concern intact, it is now finally divided,—our partner who has heretofore held the editorial management has taken the name of the *Journal* and gone out, leaving the entire office on our hands, and some affairs to settle. And we now feel that though he has assumed, in this separation, to supply our subscribers with the *Journal* numbers due them, yet that we had assumed an imperative responsibility in aiding to induce those subscriptions that should be met—and further that the time has now come for us to undertake the publication of that model legal journal that we had so long contemplated.

This endeavor is emphasized by the fact that one of the earliest subscribers to the *San Francisco Law Journal* has just handed us a list of cases embracing ten California Supreme Court decisions that have been omitted during the past six months from the *San Francisco Law Journal*, while claiming that it contained them ALL,—to say nothing of the many serious errors that have recently so abounded. We exclaim in the language of "Truthful James," "can these things be?"—and declare most emphatically our endeavor that they shall be so no longer!

We present to the profession this the initial number of the CALIFORNIA LEGAL RECORD, with the assurance that it shall hereafter contain : 1st. ALL the current Decisions of the Supreme Court of California, soon as rendered, with full statement of facts and syllabus, also full notes of all Unwritten Opinions ; to commence with March 1st, so as to form a complete continuation from Vol. 1 of the *S. F. Law Journal*. 2d. A Digest of the yet unpublished decisions of the Supreme Court rendered since the publication of Vol. 51 of California Reports—from January, 1877—as rapidly as they can be prepared—down to the commencement of Vol. 1 of the *S. F. Law Journal*, and including those omitted therefrom, and which will be of considerable value for reference, as we understand Vol. 52 will not issue for about a year yet to come. 3d. Current Land Decisions from the Department of the Interior, of special interest to this Coast. 4th. Legal notes, or current mention of interesting and valuable items, professional or otherwise. 5th. County briefs, or items of current professional interest from the county seats of the counties of the State. 6th. Important decisions of the U. S. Circuit and District Courts of this State, and the U. S. Supreme Court, and the Supreme Courts of Nevada, Oregon and Washington, and the Courts of last resort of other States.

We shall also maintain a "Lawyers' Directory" on the cover page of the RECORD for all those who desire to place their correct address in the hands of the legal fraternity.

And we assure our friends that every department shall be in fully competent hands for the entire purpose, and we hereby most cordially and earnestly invite all our friends and subscribers to co-operate with us by sending for the RECORD any item of interest or value that may come under their cognizance, or special case they may have conducted, &c.,—for mutual benefit.

The digest of previous decisions will commence in our next number.

BOUND COPIES of Vol. 1 of the *San Francisco Law Journal* in law sheep can be obtained at the office of the LEGAL RECORD, 603 Washington street, at the subscription price, adding \$1 for binding. These contain the full decisions of the Supreme Court of California, with a very few exceptions, from September 1, 1877, to February 23d, 1878—with complete index—from which last date the LEGAL RECORD will be a full and unbroken continuance ; and its digest of opinions added will cover the entire ground from January 1, 1877—the present terminus of the California Reports, Vol. 51.

Supreme Court of California.

[January Term, 1878.]

[No. 5410.]

[Filed March 21, 1878.]

DAVIS vs. RUSSELL.

WAREHOUSE RECEIPT—ON SAME FOOTING AS BILL OF LADING—INSTRUCTIONS BY COURT BELOW.

The possession of a warehouse receipt, even though indorsed in blank is presumptive evidence of ownership of property named therein ; hence it is negotiable and passes title by indorsement same as a Bill of Lading. But notice given by owner that the holder of receipt was only agent for sale of the property would retain ownership.

The facts appear in the opinion.

Terry, McKinne & Terry; Budd & Son, and F. T. Baldwin, attorneys for plaintiff and respondent

Byers & Elliott and Hewel & Turner, for defendant and appellant.

OPINION BY THE COURT.

Davis being the owner of a lot of wheat deposited it in the warehouse of Russell, took a warehouse receipt for it in the usual form, and thereafter indorsed the same in blank and delivered it to Barney. Barney transferred the receipt to the Bank of Stockton, and the bank transferred it to a person not a party to the action, and the wheat was afterwards delivered by Russell to the holder of the receipt. The bank was notified by Davis that he had not sold the wheat to Barney, but the witnesses do not agree whether it was before or after the bank transferred the receipt. Before the wheat was delivered to the holder of the warehouse receipt, Davis made a demand upon Russell for a delivery of the wheat, but Russell refused to do so unless the receipt was returned to him. Davis claims that Barney was only his agent for the sale of the wheat, and that he—Barney—transferred the receipt to the bank as security for an antecedent debt due from him to the bank. The defendants claim that Barney purchased the wheat from Davis, that he transferred the receipt to the bank not only as security

for an antecedent debt but also for further advances which were afterwards made, and that the transfer by the bank was prior to the time when it was notified that Davis had not sold the wheat to Barney.

The jury found for the plaintiff.

The court was requested by the defendants to give the following instruction: "The possession of the instrument in writing produced in evidence, dated August 18, 1875, and called a warehouse receipt, covering this wheat in controversy, together with the plaintiff's indorsement thereon, is of itself presumptive evidence of the ownership of the grain, by the person having such possession of such receipt so indorsed;" but the court refused to give the instruction, and gave the following instructions at the plaintiff's request: "If the jury believe from the evidence that the plaintiff did not sell the wheat in controversy to Barney, but authorized him to sell the same at a fixed price for cash, to be paid on or before delivery, then the endorsement and delivery of the warehouse receipt did not vest Barney with the title of said property, or deprive plaintiff of his title and right to the possession of the wheat." Also, that "the instrument in writing called a warehouse receipt is not a contract for the payment of money or personal property, and cannot be transferred by endorsement like a negotiable promissory note." Other instructions were given embodying the same legal proposition. There was evidence introduced by the defendants tending to show that Barney had purchased the wheat from the plaintiff, and that the warehouse receipt endorsed in blank by the plaintiff, had been transferred to the bank of Stockton, and by the bank transferred to a person not a party to the action before the bank was notified by the plaintiff that he had not sold the wheat to Barney; and the defendants were entitled to have instructions given to the jury which would state the effect of such transfers of the warehouse receipt. The foregoing instruction requested by the defendants expresses very fairly the law in that regard. It was held in many cases in the English courts that an assignment of such a receipt does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and

agrees to hold the goods for the assignee, (Benjamin on Sales, §815.) No substantial reason is offered for giving to the assignment of such an instrument an effect differing materially from that of an assignment of a bill of lading. In *Horr vs. Baker*, 8 Cal., 613, a warehouse receipt was regarded as standing on the same footing as a bill of lading; and it was held that a transfer of such receipt operated as a transfer of the title to the goods. The doctrine of that case has not been questioned, so far as we are aware, by the courts of this State. If an assignment of the receipt will transfer the title to the goods, it must necessarily follow that the possession of the receipt, endorsed in blank, is presumptive evidence of the ownership of the goods by the holder of the receipt. The defendants were entitled to an instruction which would give them the benefit of that presumptive evidence, although as between the plaintiff and Barney, and those claiming under Barney, with notice that he was only the agent of the plaintiff (if such was the fact), the plaintiff remained the owner of the wheat.

The Court also instructed the jury that "if you believe from the evidence in the case that Davis did sell the wheat in question to Barney, your verdict will be for the defendants.
* * * If, however, you find that there was no sale of this wheat, and that there was a demand and refusal of it by the party, then it is your duty to find a verdict for the plaintiff for a return of the wheat or its value." This instruction entirely ignores any rights which any of the defendants may have acquired, in reliance upon the apparent ownership or authority of the holder of the warehouse receipt, and in that respect is erroneous. It is provided by the Civil Code, §2992, that "One who has allowed another to assume the apparent ownership of property, for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value." The evidence seems to leave no room for doubt that the Bank of Stockton received the warehouse receipt from Barney in good faith, and in the ordinary course of business; and upon the authority of *Payne vs. Bensley*, 8 Cal.,

260; Robinson vs. Smith, 14 Cal., 94; Naglee vs. Lyman, 14 Cal., 450, and Frey vs. Clifford, 44 Cal., 355, it must be held that the pre-existing debt of Barney to the bank constituted a valuable consideration within the meaning of that section. If the evidence brings the case within that section, neither the Bank of Stockton nor Russell would be liable to the plaintiff in this action.

Judgment and order reversed and cause remanded for a new trial.

[No. 5306.]

[Filed March 21, 1878.]

HAGAR vs. SPECT.

CONVEYANCE OF TITLE—ESTOPPEL IN PAID.

Was an undivided interest in the premises in this action conveyed.

STATEMENT OF FACTS.

This is an action to recover block ninety in the town of Colusa. The deeds and documentary evidence of the record on each side are the same as those in the case of Spect vs. Gregg (No. 4337) in the Supreme Court, decided at the October term, 1875. It is claimed by the appellant in this case that the question involved affects the title to a considerable portion of the town of Colusa. It is: "Do plaintiff's (Hagar's) deeds and instruments of conveyance embrace within their calls block ninety in the town of Colusa, the property in controversy in this action?" The remaining facts are disclosed in the opinion.

W. C. Belcher and *W. F. Goad*, attorneys for plaintiff and respondent.

S. T. Kirk and *A. L. Hart*, attorneys for defendant and appellant.

OPINION BY THE COURT.

Action for the recovery of the possession of Block 90, in the town of Colusa. Both parties claim title under a patent issued to Larkin and Missroon, as the confirmees of the Jimeno grant. The Court below found that the title to the undivided five-sixths of the premises in controversy was held by

the plaintiff, and one-sixth by the defendant. The defendant appeals from the judgment and the order denying a new trial.

The first conveyance by either of the confirmees was made on the 23d day of September, 1851, and purports have been made by Larkin, for himself, and by Missroon, by Larkin as his attorney in fact, to Seawell and Hastings; and the deed purports to convey an "undivided two-thirds part of the following described tract or parcel of land, to-wit: Two Spanish leagues (or dos sitios de ganda major) of land on the west bank of the Sacramento river, part of the land formerly known as the Colusa Tract, including the town of Colusa, being a part of the eleven Spanish leagues granted by Don Manuel Micheltorena," to Jimeno, and sold by him to said Larkin and Missroon. The two leagues are further described by a reference to a grant to Bidwell, a sale by him to Semple, and a Sheriff's sale under execution against Semple.

It is unnecessary, for the purposes of this appeal, to determine whether the description is sufficient to amount to a conveyance of the whole of "two Spanish leagues of land," but the inquiry may be limited to the question whether an undivided interest in the premises in controversy was conveyed. The two leagues mentioned in the deed are described as "including the town of Colusa."

The evidence shows that the town is within the bounds of the Jimeno grant, that at the time of the execution of the deed a map of the town had been made, that the northern and southern limits of the town had been fixed and established on the ground, that stakes had been set at the corners of several of the blocks, that a number of houses had been built, and that as applications were made for the purchase of lots, surveys were made in accordance with the map. From the fact that the Court found that the defendant had title to an undivided sixth of the block of land in controversy, and that he deraigns title under that deed, it is to be inferred that the Court found that the town of Colusa had been laid out before the execution of the deed, and that the block in controversy is a portion of the land which was then recognized as within the limits of that town. If the decision in that regard

be correct, it must be held that the deed conveyed an interest in the lands within the town, however uncertain other descriptive portions of the deed may be.

The deed above mentioned was executed by Larkin, and purports to have been executed by Misroon, by Larkin, his attorney in fact, but it does not appear that Misroon had constituted Larkin his attorney in fact. The deed, therefore, is to be regarded only as the deed of Larkin. At the time of its execution he held the title to the undivided half of the land conveyed, and it must be construed as conveying his undivided half, although it purports to have been executed by Misroon, who was an owner of the title in connection with Larkin.

The record does not contain any conveyance from Seawell and Hastings—the grantees in that deed—to the plaintiff or his grantors, and the decision that the plaintiff was the owner of the undivided five-sixths of the land was not sustained by the evidence, for he could not have acquired the title to more than three-sixths unless he acquired it under the deed to Seawell and Hastings. The defendant claims that the evidence shows that no interest in the town of Colusa passed to the plaintiff under the deeds through which he derails title. By one of these deeds William J. Eames conveyed to S. A. and James Morrison and undivided quarter of "nine Spanish leagues of land * * * commencing two Spanish leagues below or southerly from the tract of land on said river, known as the rancho of Larkin's children, and running thence along with said river nine Spanish leagues, and one league back or westwardly from said river," being part of the Jimento grant, "which said grant was conveyed to William J. Eames by Henry Coghill and wife" by deed dated May 31, 1852; "and being the same tract of land conveyed to the said Samuel A. Morrison and James Morrison by the said William J. Eames (as the attorney in fact of the said John S. Misroon) by deed bearing date the 20th day of April A. D. 1852." The deed last referred to describes the land thereby conveyed as "lying and being southerly and below the town of Colusa." The proposition is, in effect, that this description limits and

controls all the other descriptive words in the deed of Eames to Morrison and Morrison. The first two descriptions appear, both from the words themselves and from the intrinsic evidence relating to the boundaries of the land, to be as certain as the third description; and, therefore, in accordance with the rule requiring the deed to be construed most strongly against the grantor, it must be held that the first two descriptions prevail over the third; and as the evidence shows that the town of Colusa is included within the first two descriptions, it must be held that the deed conveyed an undivided fourth of Colusa, if Eames held that interest.

It is further contended by the defendant that the land in controversy is excepted from the deed of Misroon to Coghill; and if not in fact excepted, that Eames, and the plaintiff claiming under him, are estopped to assert title to the premises. The deed contains the following exception: "Also excepting therefrom such parts thereof as may be sold by agent of said parties of the first part [Misroon and wife] before receiving due notice of this conveyance." The defendant introduced in evidence a power of attorney dated September 24th, 1851, executed by Larkin and Misroon by Eames, also by Seawell and Hastings to Carpenter, authorizing him to convey lots in Colusa; and he also introduced a deed dated December 12, 1851, purporting to have been executed to Monroe by Larkin, Misroon, Seawell, Hasting and Hughs, by Carpenter, their attorney in fact, conveying the premises in controversy. It is claimed that the power of attorney and the deed (both of them having been made before the deed of Misroon to Coghill) prove that the premises therein described are within the exception contained in the deed of Misroon to Coghill. But we are of opinion that this position cannot be sustained. For they do not prove, as against Misroon, that Eames was his agent. There is more force, however, in the position that the plaintiff is estopped than to deny that Eames was such agent. The plaintiff claims title through the deed of Misroon to Coghill and the deed of Coghill to Eames. The boundaries of the land described in those deeds, as already remarked, include the premises in controversy, and Eames by the execution of the power

of attorney, as the attorney in fact of Misroon, whereby he purported to confer upon Carpenter authority to convey the premises, represented that he held competent power from Misroon to constitute Carpenter the agent of Misroon, with authority to sell and convey the premises. Although the power of attorney might not bind or effect Misroon, in the absence of proof that he had authorized Eames to execute it, yet when the title came to the hands of Eames from Misroon, Eames was estopped to deny that he had been duly authorized to execute the power of attorney. Its purpose was to induce those desiring to purchase lots in Colusa, to believe that he had power in the name of Misroon to authorize Carpenter to sell and convey the lots, and, purchasers relying thereupon, as they were entitled to do, would be injured were Eames now permitted that he possessed the power which by the execution of the power of attorney he professed to have. The act of Eames and the acceptance of the conveyance executed by Carpenter as such attorney in fact, contain all the elements of an estoppel *in pais*, and in our opinion, became binding and effectual as against Eames, as soon as the title vested in him, and bind those claiming title under him.

Judgment and order reversed and cause remanded for a new trial.

[No. 4514.]

[Filed March 29, 1878.]

BIHLER vs. PLATT.

TENANTS IN COMMON—PATENTS—PRACTICE AND PLEADING. — This suit was brought by plaintiff to quiet title. His title derived from Meyer & Bennitz; and defendant's from Hendy & Glein. Prior to the deeds to plaintiff and defendant the title to the land in controversy had been confirmed and patented jointly to Meyer, Bennitz, Hendy, Glein and Duncan. Plaintiff also claimed through one Rufus who had a Mexican grant, and alleged in his complaint that he was the owner in fee simple, absolute, and had been in actual possession for more than fifteen years. *Held*, that he was only a tenant in common with the defendant, and that if any equities existed in his favor growing out of the deed of Rufus, they must be determined in some action with appropriate pleadings and all necessary parties. (Duncan was not a party to this action.)

The facts appear in the opinion.

Crane & Boyd and *H. P. Irving*, attorneys for appellant.

H. H. Haight, attorney for respondent.

OPINION BY THE COURT.

The action was commenced before the Codes took effect, and its object is to quiet the plaintiff's title to a parcel of land included in the "Rancho de Herman," which was granted by the Mexican Government to one Rufus, and the title to which has been finally confirmed and patented to Meyer, Bennitz, Hendy, Glein and Duncan, as the successors in interest of Rufus. The petition for confirmation was filed in 1852, in the names of Meyer, Bennitz, Hendy, Glein and Duncan, to whom the patent subsequently issued and the plaintiff derains his title under Meyer and Bennitz, and the defendant Platt under Glein and Hendy, all subsequently to the filing of the petition for confirmation. The complaint avers that at the time of the commencement of the action, the plaintiff was the owner in fee simple absolute, and in the quiet and peaceable possession of the land described in the complaint, and that he and his grantors had been in the actual quiet, adverse and peaceable possession, claiming title under deeds purporting to convey the land to the plaintiff and his grantors, for more than fifteen years last past. At the trial, the plaintiff derained his title through—first, a deed from Rufus (the original grantee) to Hugal, made in the year 1847, purporting to convey a specific parcel of land by metes and bounds, which, it is claimed, include the premises in controversy; second, a deed from Hugal to Meyer and Bennitz, made in the year 1849, purporting to convey the same premises; third, a deed for the same premises from Meyer and Bennitz to the plaintiff and one Wagner, made in the year 1855, and a subsequent deed from Wagner to the plaintiff: fourth, a patent from the United States, issued in the year 1872, to Meyer, Bennitz, Glein, Hendy and Duncan, under the decree of confirmation for the Rancho de Herman. In his defense the defendant Platt put in evidence: 1st, the two deeds made from Rufus to Glein, made in the year 1847, purporting to convey by metes and bounds two specific parcels of land included in the Rancho de Herman;

2d, a deed from Glein to Adams, made in 1869, purporting to convey the same lands; 3d, a subsequent deed from Adams to Platt for the same lands; 4th, a deed from Hendy to Platt, made in the year 1869, conveying all the right title and interest of former in and to the Rancho de Herman; 5th, a deed made in the year 1869, from Glein to Adams, conveying all the right, title and interest of the former in and to the Rancho de Herman, and a subsequent deed from Adams to Platt conveying the same interest.

So far as appears from the record before us, the decree of confirmation was to Meyer, Bennitz, Glein, Hendy and Duncan as tenants in common, each for an equal undivided interest; and in this respect the patent follows the decree. It purports on its face to convey the title to the five patentees as tenants in common, and there is nothing in the record to indicate that either the decree of confirmation or the patent in any manner recognizes the five patentees as holding in severalty, or otherwise, than as tenants in common. It is clear, therefore, that the legal title conveyed by the patent vested in the five patentees as tenants in common, or in their grantees, holding either under conveyances made after the filing of the petition for confirmation, or if made before that time, containing such covenants as would convey the after-acquired title by way of estoppel. (*Schults vs. Giovanari*, 43 Cal. 617.) The plaintiff's title is derived from Meyer and Bennitz, two of the patentees, under a conveyance made after the petition for confirmation was filed, and the title of the defendant, Platt, is debarred from Glein and Hendy, also two of the patentees under the same circumstances. The legal title, therefore, passed by the patent to the plaintiff, to the defendant and to Duncan, (who is not a party to the action) as tenants in common. If the plaintiff is entitled to any equities founded on the deed from Rufus to Hugal, which should control the legal title, conveyed by the patent, his complaint is not so framed as to entitle him to relief on that ground. No facts are alleged in the complaint as the basis for equitable relief, founded on that conveyance. On the contrary, the complaint alleges that the plaintiff "is the owner in fee simple absolute" of the premises

in controversy—a fact which was disproved by the production of the patent, by which it was established, in connection with the conveyances to the plaintiff and the defendant Platt, that he and the plaintiff, together with one Duncan, are tenants in common of said premises. If the plaintiff were to obtain a decree in this action, founded on his alleged equities arising from the deed from Rufus to Hugal, quieting his title to the particular tract in controversy, as against the defendant Platt, the result would be that the plaintiff would continue to be a tenant in common with Platt and Duncan as to the remainder of the tract, while holding in severalty as against Platt, but not as against Duncan (who is not a party to the action) the particular tract now in controversy. We are of the opinion that whatever equities, if any, the several parties may have, founded on the conveyances made by Rufus, must be determined in an action with appropriate pleadings, in which all the necessary parties are before the court.

Judgment and order reversed and cause remanded.

Notes of Unwritten Opinions.

IN *Gottschalk vs. Kester*, just decided by our Supreme Court, the material facts are these: The plaintiff brought suit in ejectment for certain premises of defendant bought by plaintiff at a constable's sale, upon an execution and attachment in an action by Frank & Dallemand against defendant. The defendant claimed the premises as his *homestead*, his declaration of homestead having been filed and recorded in October 26, 1875. On October 27th Frank & Dallemand commenced action in Justice Court for debt, and levied on the premises of defendant. The point upon which the decision turned was that of *actual residence* at time of filing the declaration. The facts shown were that the defendant, Kester, removed the most of his family and household goods from his said premises on December 1st, 1874, to the "Spring Valley House," about a mile away, which he had leased for one year, but leaving a minor son and some goods upon the premises, which

he still cultivated. This lease was cancelled on October 12th, 1875. His family still remained at the "Spring Valley House" till November 10th, but he returned and slept in his house on said premises on the night of October 24th, thereby claiming a *continuance* of residence. The Court below held that it was not *actual residence* sufficient to justify his declaration, hence the sale resulting was valid and judgment was for plaintiff. This judgment was affirmed.

In the case of Coburn vs. Ames, action was brought to recover a tract of land and wharf and chute located thereon—entered June 15th, 1876. Judgment rendered against defendants.

On July 22d of the same year, Judge appointed receiver without notice to defendants. The appeal is confined solely to the power of the Court to make such order.

Jury trial waived in the Court below.

The Court finds that the plaintiff is entitled to recover possession of land and wharf and chute, from which decision defendants appealed. Decision affirmed.

In Zeile vs. Hood, the plaintiff and defendant owned adjoining lots. Defendant gave notice to the plaintiff that he intended excavating his lot for the purpose of building, and requested him (plaintiff) to secure his walls from falling. The defendant himself underpinned plaintiff's wall at a cost of \$152.54, but the plaintiff believing the underpinning not sufficient to secure the wall, expended the sum of \$410.50. The question raised is whether the plaintiff shall pay defendant \$152.54, or whether the defendant shall pay the plaintiff \$410.50. The Court below gave judgment for the plaintiff and the Supreme Court affirms the judgment.

In Friedman vs. Nelson, the following order was entered by the Court: Re-argument of this case ordered upon the question whether the plaintiff derives through "a conveyance duly made by the Commissioners of the Funded Debt," etc., so as to bring the case within the benefit of the Van Ness Ordinance, so-called—and in this connection whether the Act of April 14th, 1857, entitled, "An Act to legalize certain conveyances operated to validate the conveyance of September 15, 1852, from the Board of Commissioners of the Funded Debt, to Gordon, within the interest of the section of the Van Ness Ordinance already referred to."

Legal Notes.

IN the matter of *Seale vs. the Board of Supervisors of the City and County of San Francisco*, the judgment of the Court below was affirmed, no accompanying opinion having been filed. The following is a summary of the facts in the case :

This is an application for a mandamus to compel the Supervisors of the City and County of San Francisco to draw warrants on the Treasurer of said City and County in payment of arbitration award rendered in favor of the appellant.

By the Act of April 4th, 1870, a Board of City Hall Commissioners was created and empowered to enter into contracts for the construction of a City Hall, for the City and County of San Francisco, and to draw warrants upon the City and County Treasury for the payment of the same, under which Seale entered into and performed contracts for which he claimed \$154,032 20, on which said Board from time to time paid him in warrants, \$114,064 26, leaving a balance of \$39,967 94.

The Legislature subsequently substituted the Board of Supervisors as Commissioners, and made that body *ex officio* members of the Board of City Hall Commissioners, authorizing them to adjust and pay all existing contracts in the same manner as the original Board. The same act provided for the issuance of \$750,000 in bonds, to be used in payment of warrants already drawn by the original Board, or that might be issued by the Supervisors acting as such Board of Commissioners, and persons holding such warrants had the privilege of exchanging them dollar for dollar for bonds, all of which were issued, but only a portion was so exchanged.

After the Board of Supervisors had entered upon their duties as a Board of City Hall Commissioners, Seale presented his claim of \$39,000 to them and demanded that they adjust and draw warrants in his favor for the same ; whereupon the Board referred said claim to a committee for investigation and report.

By agreement between the parties, the matter was referred

to a Board of Arbitrators, before whom each appeared and submitted their proofs. The balance found to be due Seale on his contract was \$30,083.49, and the Board decided that he was entitled to warrants for the same, to be drawn by the Supervisors acting as Commissioners, which award was accepted, and the amount ordered paid by a resolution of the Board.

The Mayor, assuming that he had authority to veto this action of the Board of Supervisors, Seale demanded a compliance with the award and the issuance of the warrants called for under the law, which being refused, he commenced this proceeding.

On the 24th of March, 1876, after the commencement of this action, a new Board of City Hall Commissioners, consisting of the Mayor, City and County Attorney, and Auditor, was created by Act of the Legislature. This Act provided that the new Board should proceed with the construction of the City Hall, leaving the adjustment and payment of the existing indebtedness to be made by the Board of Supervisors, acting *ex officio* as a Board of City Hall Commissioners, as before stated.

The new Board sold the bonds on hand for \$565,035.75, out of which was paid warrants drawn by the original City Hall Commissioners, amounting to \$216,304.07, and by the Supervisors, acting as such Board, \$42,912.76, and warrants drawn by the new Commissioners amounting to \$38,558.26, leaving a balance in said fund, subject to the payment of said Seale's claim, on the 10th day of May, 1876, when this action was tried, of \$167,260.16. It is claimed under this showing that "the case stands on the naked refusal of the officers charged with this duty to draw the warrants to which the plaintiff is entitled under the law."

It is further claimed that the five Acts of the Legislature relating to the construction of the New City Hall are independent of the Acts for the government of the City and County of San Francisco, and that when the Supervisors were made *ex officio* Commissioners they were charged with the same duties and subject to the same regulations as the original Commissioners; that the Board of Education, and other boards, exist

with independent powers, and expend money of the city and county without any action of the Mayor.

It is claimed by the appellant that, construing all the Acts referring to the construction of the City Hall together, there is a complete system for performing work and paying for the same. (*Crane vs. Reeder*, 22 Mich., 322 ; *Sedgwick on the Construction of State and Constitutional Law*, p. 359-60.) The question of the right of a municipal corporation to submit to arbitration arose in the case of *Brady vs. the City of Brooklyn*, 1 Barb., 590, in which the Court held that corporations have all the powers of private parties as regards contracts, except where expressly restricted or by necessary implication. A case is cited as before the Court at the same term (*the Mayor, &c., of New York vs. Butler*) which turned mainly on an award where a corporation was a party. The Court also held that it was well settled that "whenever a corporation is acting within the scope of the legitimate purposes of its institution, all its contracts, whether sealed or unsealed, written or (through its agents) by parol, are valid." (*Bank of Columbia vs. Patterson*, 7 Cranch. 299 ; *Mott vs. Hicks*, 1 Cowen, 519.) The case of *Dix vs. Dummerston*, 19 Vt., 266, holds that the Selectmen of a town have power to submit to arbitration any claim against such town, which they are authorized by statute to audit and and adjust, and that the town will be bound by the award. (*Ketchum vs. City of Buffalo and Austin*, 14 N. Y., 375 ; *Morse on Arbitration*, p. 6 ; *Buckland vs. Conway*, 16 Mass., 376.)

The submission by resolution of the Board was a good submission. (*The Mayor of New York vs. Butler*, 1 Barb., 325, *et seq.* ; *Brady vs. the Mayor of New York*, Id. 591.)

Awards of Arbitration are equally as conclusive and binding as judgments of Courts. (*Freeman on Judgments*, §320 ; *Smith's Leading Cases*, p. 671, and cases there cited ; *Wendell's Blackstone*, p. 16.)

It was the duty of the Board to adjust and pay the claim. (See Section 13 of the Act of 1870,

PATENT INFRINGEMENT EXTRAORDINARY.—U. S. Marshal Poole has levied on certain property of the first Board of

New City Hall Commissioners in favor of the Pacific Submarine and Earthquake Proof Wall Co. for the use of a patent method for strengthening brick walls with iron rods, in the building of the New City Hall.

It appears that Wm. H. Foye, a resident of this city, had invented and patented such a plan, but which had not yet been applied to any large buildings here, although it had been favorably reported upon by the Board of Construction in New York Harbor, at the recommendation of Secretary of War Belknap. Foye called upon the City Hall Commissioners to investigate its merits, but they neither adopted nor rejected it. Foye went east in the spring of '73, notifying the Commissioners regarding it. Upon his return, finding they had applied it, he sent in his bill for \$15,000. After six months delay and many interviews, he finally brought suit in the Federal Court and obtained judgment for \$10,000. This judgment the Commissioners paid. Pending this suit and delay, work had been going on, and more royalty on the use of the patent had accrued, and another bill was sent in to the Board of Supervisors, who had now assumed charge of the building. This bill was at first rejected by them, but afterward referred to the City and County Attorney, but no definite action taken, and in about two years the second action was brought in the Federal Court, and judgment again recovered. The legislature subsequently passed a bill empowering the Board to pay the judgment, but neither they nor the present Board of Commissioners have yet done so, hence the execution above stated. The plaintiffs declare they will not sue the city, but make the Commissioners individually responsible. Accruing interest on the unpaid judgment has already swelled the amount to \$5,584.50.

INDEXING SUPREME COURT CASES. — A bill has passed both Houses of the Legislature authorizing the Clerk of the Supreme Court to make a thorough index of the cases in that Court, from the date of its organization to the present time. Inasmuch as this will prove of great practical utility not only to the profession, but to outside parties, there is no doubt but that this Act will be approved by the Governor,—a recommendation in its favor having been signed by a large number of the members of the Bar of this city, and the State at large.

THOS. CHITTY, the famous legal author, has recently died in England at the ripe age of 79 years.

Interior Court Notes.

FRESNO COUNTY.—An injunction has been issued by the Thirteenth District Court in the case of the Bank of California against the Fresno Canal and Irrigation Company, restraining the latter from selling any more water rights, and forbidding the fulfilment of contracts already existing. The basis of the action was an agreement by which the latter was to deliver a certain amount of water on lands lying west of the Central California Colony, and agreeing to sell no water to other parties until this agreement was fully complied with—which contract the company failed to fulfil, the present managers claiming that the contract had been abrogated by the parties of the first part.

YOLO COUNTY.—The District Court, S. C. Denson Judge, met at Woodland on Tuesday, March 19th, a special term being held for the trial of a case which had been on the calendar a long time—the Woodland Ditch Company vs. the Clear Lake Water Works. The fact that forty witnesses were in attendance would indicate its importance. The motion of defendant for a non-suit was granted, and the Court adjourned.

SAN JOAQUIN COUNTY.—The Stockton Daily *Independent* of March 27th, states that the fifteen Chinamen arrested on the charge of assault to murder a man on Union Island, were taken before Justice Hopkins the day previous, where their preliminary examination was postponed to April 6th. One of the number was released, there being no evidence against him. The others were remanded to jail to await the action of the Grand Jury at the term specified,

PLACER COUNTY.—On Monday, March 11th, on motion of W. H. Bullock, District Attorney of Placer County, an order was made transferring to the District Court the cases of P. Varnum, Albert Albert, Indian Charley, Indian Bill, and Hun Fook, indicted for murder, and after the transaction of other business, the Court adjourned to Monday, March 25th.

MONTEREY COUNTY.—At the March term of the District Court, which met at Salinas, Monday, March 18th, in the case of the People vs. Felipe Carillo, indicted for murder, N. A. Dorn was appointed Special District Attorney to prosecute in this case, which was set for trial on the 21st inst.

LAKE COUNTY.—A case was tried in a Lake County Court a short time, since in which a party sued for debt pleaded a

non-advertisement of a notice of copartnership by the plaintiff, which was sustained by the Court.

SANTA CLARA COUNTY.—W. H. Patterson has commenced suit in the District Court against Henry M. Naglee to recover \$5,718.17, for moneys alleged to have been collected and legal services rendered.

SANTA BARBARA COUNTY.—Judge Sepulveda has rendered a decision in the celebrated Dos Pueblos Ranch case in favor of plaintiffs upon every point. This settles the question of title as to Colonel Hollister and others.

AMADOR COUNTY.—The Grand Jury of Amador County was recently in session four days, the longest term held in that county for years.

Book Notice.

SAYLER'S AMERICAN FORM BOOK.—We have received from the well-known publishing firm of Robert Clarke & Co., of Cincinnati, a copy of this valuable work. It is, as its title imports, a national work, containing the most improved legal forms and instruments for the use of professional and business men, together with a statement of the law of deeds, mortgages, exemptions from executions, mechanics' liens, wills, etc., for all the States and Territories,—by J. R. Saylor, a well-known counsellor at law of the Ohio bar. The work exhibits remarkable industry and research, and great care has evidently been exercised in its preparation to insure correctness in every essential particular. It is issued in the handsome style for which the publishing house whose imprint it bears is so widely and justly celebrated.

It is our most earnest aim and desire to make the CALIFORNIA LEGAL RECORD a necessity to the legal profession on this Coast—and to this end we claim the countenance and sympathy of the profession, and shall always be pleased to accept and publish items and points of interest and value to the fraternity from the various Courts. There should be material found on the Pacific Coast to furnish a creditable law record without a too free appropriation of clippings from our Eastern contemporaries. To our friends and patrons in all parts of the State, we extend the freedom of the RECORD office when in the city—and bring your friends.

CALIFORNIA LEGAL RECORD.

Vol. I.

APRIL 6, 1878.

No. 9

Supreme Court of California.

[January Term, 1878.]

[No. 4888.]

[Filed March 20, 1878.]

THOMPSON VS. CORPSTEIN.

ACTION IN REPLEVIN.—Statute of March, 1874, concerning roads and highways in Santa Clara county. Stock not allowed to pasture on public highways. Cattle estray or running at large on any public road may be impounded. *Held*, 1st, that cattle passing along the road under charge of herder are not liable to the Act, through any accident to herder. 2d. The facts do not show that these cattle were pasturing on the highway within the meaning of this Act.

The facts appear in the opinion.

D. W. Harrington, attorney for plaintiff and appellant.

Moore, Laine & Leib, attorneys for defendant and respondent.

OPINION BY THE COURT.

In the statute of March, 1874, concerning roads and highways in the county of Santa Clara (§37), it is enacted that no stock of any kind shall be allowed to pasture upon any public highway, and it shall be the duty of all roadmasters and deputy roadmasters, within their respective districts, to take up all animals found pasturing upon the public highways, and to deal with said animals as provided for in an act to amend an act concerning estrays and animals found running at large in the county of Santa Clara," etc.

Upon reference to the latter act it is therein provided, that the estray cattle, or cattle running at large upon any public road, may be taken and impounded.

It is apparent that both acts deal with the case of cattle running at large, or being estray, and not with cattle passing over and along a public road in charge of a herder, and not

being upon the road for the purpose of being pastured there.

It is not the intention of the act that cattle being driven along the road in charge of a herder, and which, in passing, should casually eat of the grass growing at the roadside, should for that reason be subjected to proceedings by the roadmaster under the act first referred to. The Court below found that the plaintiff's cattle had been driven from the plaintiff's land to Wolf Creek upon the Stephens Creek road for the purpose of being watered, and while there in charge of a herder, who seems to have fallen asleep for the moment, were found pasturing upon both sides of the road.

There is no pretense that the plaintiff, or the herder, intended that the cattle should pasture upon the road and that they were found eating the grass there, was owing solely to the accident of the herder falling asleep for the moment. Had he fallen down in a fit, or been disabled by a sudden attack of disease, the same consequences might, and probably would have ensued, but we do not think that in the one case, more than in the other, the cattle would be subject to proceedings under the Act.

We are of the opinion that the conclusions of law, second in number, deduced by the Court below, "That the plaintiff was pasturing and permitting to pasture, the cattle referred to, upon said highways, when the same were seized by the defendant," cannot be supported upon the facts found at the trial.

The action is replevin, and the facts, as to the value of the cattle, and the damage, if any, sustained by the plaintiff, are put in issue by the pleadings, but are not determined by the findings. We cannot, for this reason, direct final judgment for the plaintiff here, and there must be a new trial of the action below.

Judgment reversed and cause remanded for a new trial.

[No. 5713.]

[Filed March 30, 1878.]

DOWD vs. CLARK.

LEASE WITH RIGHT TO PURCHASE.—Lessee might elect to purchase any time during term of lease on specific terms. Plaintiff or lessee *did* notify

defendant and lessor during said term, of his election to purchase under the provisions of lease. Defendant refused the tender, and this refusal was a waiver of necessity for a tender before bringing suit. Plaintiff offers in complaint to comply with all the conditions of the agreement. Held, that this entitles him to a *specific performance* of the contract.

STATEMENT OF FACTS.

This is an action brought to compel the specific performance of an agreement to sell real estate. On the 27th day of March, 1866, defendant leased plaintiff certain premises for the term of six years from October 1st of that year, covenanting to give the plaintiff the right to purchase,—the true construction of which covenant to purchase was the chief matter of contention in the Court below. There being no findings or opinion filed, appellant's counsel ventures the presumption that the judgment adverse to his client adopted the defendant's construction of this covenant and assumes the following position: 1st. "No matter which construction is adopted, and no matter how much is due under the contract, the plaintiff cannot in equity be turned out of Court;" and, 2d, "that plaintiff's construction is the correct one." It is further contended that the plaintiff might elect to purchase at any time during the term of the lease, and that after such election to purchase would, if he chose, have until the expiration of such term to make payment, and that until he availed himself of the privilege of purchase would continue as lessee of the land. Further, that the moment he signified his election to purchase, his character as tenant would cease—and he would become vendee of the land rightfully in possession under his contract of sale, his obligation to payment ceasing at such time. Becoming thus the owner of the land he would in equity and justice be bound to bear the burdens such as taxes and assessments imposed upon it, and the respondent would have an interest in seeing that they were properly discharged, because after Dowd's election Clark would hold the legal title of the land as security for the payment of the purchase money until fully paid.

On the part of the respondent it is contended that the most favorable view of the case for the appellant would be that he was not bound to elect to purchase or pay until the last day of the term, and if he thus elected so to do, the purchase money would be \$6,000, with interest at one per cent per month from date of the lease, less the rents previously paid, to which was to be added the taxes upon the property which plaintiff had failed to pay. Respondent further alleges that the complaint contains no averment of fraud, mis-

take or accident, and the appellant asks for the specific performance of the contract as appears on its face—whereupon the Court cannot disregard any portion of the same. To entitle plaintiff to a decree he must show himself “eager, prompt, ready and desirous” to perform the whole contract upon his part, and until he does this the defendant is not in default.

Delmas, attorney for appellant.

Williams & Thornton, attorneys for respondent.

OPINION BY THE COURT.

As we construe the lease of March 27, 1866, it provides : First, that the lessee may elect to purchase at any time during the term, in which event he shall pay to the lessor during the term, the sum of \$6,000 in gold coin, with interest from the *date of the lease* at the rate of one per cent. per month, and any payments, which, in the meantime, shall have been made for rent, shall be credited on the interest ; second, that if the lessee elects to purchase, he shall also pay in addition to the the principal and interest, whatever sum shall in the meantime have been levied on the land and paid by the lessor for taxes from the date of the lease ; third, that from the time the lessee elects to purchase, the interest shall *thenceforth* be paid on the first days of January and July in each year ; and if not so paid shall be compounded at the rate of two per cent. per month until paid ; fourth, that if the lessor shall have incurred expenses by reason of the failure of the lessee to perform the covenants by him to be performed, the same shall be refunded by the lessee with interest at the rate of two per cent per month, compounded monthly.

There is no conflict in the evidence as to the fact that before suit was brought the plaintiff notified the defendant during the term, that he elected to purchase under the provisions of the lease, and defendant refused the tender, and denied that the plaintiff was entitled to purchase under the lease. He ignored altogether the right of the plaintiff to purchase, and on well settled principles this was a waiver of the necessity of a tender before suit was brought. But in his complaint the plaintiff avers that he is ready and willing, and offers to comply with all the terms and conditions of the agreement, and to pay any sums that may be due the defendant for the purchase of said premises under the contract. This we think is sufficient to entitle him to a specific performance of the agreement.

It is unnecessary to determine on this appeal whether the

interest ceased from the time of the tender and the refusal of the defendant to recognize the plaintiff's right to purchase.

Judgment and order reversed, and cause remanded for a new trial.

[No. 5662.]

[Filed March 27, 1878.]

MEEKS vs. SOUTHERN PACIFIC R. R. CO.

LIABILITY OF RAILROAD CORPORATIONS FOR DAMAGES.—The provisions of section 496, Civil Code, that a railroad shall be liable for damages under certain circumstances, does not abrogate the doctrine of a contributory negligence on the part of an injured party.

SAME.—Does not operate to give right of action where negligence of the injured person materially and proximately contributed to the injury. *Held*, that plaintiff was guilty of negligence *per se*, in using the railway track for a playground—hence could not recover.

STATEMENT OF FACTS.

Samuel H. Meeks, Jr., the plaintiff and respondent in this case through his guardian *ad litem* Samuel H. Meeks, Sen., the former a boy six years of age at the time of the injury complained of, seeks to recover damages for injuries which it is alleged he sustained by reason of the negligence of the defendant. At the time of the accident plaintiff was lying asleep between the rails of defendant's road. The engineer at the distance of five hundred feet discovered an object but failed to make out what it was until within a hundred feet, when he gave the signal down brakes and reversed the engine. Plaintiff's left foot was so badly crushed as to require amputation, the right also sustaining injury. Upon the trial of the case in the Court below, the jury found for plaintiff, assessing the damages at \$10,000. Defendant's motion for a new trial being denied, this appeal is taken.

Certain instructions to the jury were excepted to by the defendant,—and others requested by defendant were refused, which refusals were also excepted to.

Appellant contends that the plaintiff was guilty of such contributory negligence as deprived him of any right of action,—and that there is no conflict of testimony upon this point. That the fact of his lying asleep on the track of defendant's road would have been such contributory negligence as to bar a recovery had he been an adult, could not be denied.

In *Sims vs. M. & W. R. R. Co.*, 28 Ga., 95, the Supreme Court of Georgia says: "To go to sleep in such a place

could be nothing short of the grossest negligence." It is contended that the fact that plaintiff was only six years of age, does not alter the case. If the plaintiff was old enough to take care of himself the negligence should be imputed to him; if not of sufficient intelligence,—to his parents—the result being the same, in either case he is barred of his action. In the latter case the law charges the negligence of his parents to his account and he is as much barred by it, as if it was his own. *Sherman and Redfield on Negligence, sec. 48.*

It is further alleged on the part of the appellant that the only grounds upon which a charge of negligence can be based are in not sounding the whistle or ringing a bell within eighty rods of the crossing—and in not making an effort to stop the train on the discovery of the object on the track. In regard to the first it is claimed that the statute requiring the ringing of a bell on approaching such crossing is for the benefit of parties traveling on the highway—"and not for the benefit of those who unlawfully convert it into a place to sleep upon." Plaintiff was not upon the traveled crossing, but was asleep on the railroad track at least ten feet from the same.

Numerous cases are cited where persons were similarly injured while asleep on railroad tracks, in none of which a recovery was allowed.

On the part of respondent negligence is claimed in not sounding the whistle and ringing the bell, and in paying no attention to the obstructions when first discovered at a distance of five hundred yards.

Glassell, Chapman & Smiths and *Satterwhite*, attorneys for defendant and appellant.

C. W. C. Rowell and *A. B. Paris*, attorneys for plaintiff and respondent.

OPINION BY THE COURT.

1. The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation, when a bell is not sounded or a whistle blown, as directed by that section, does not abrogate the doctrine of a contributory negligence, or operate to give a right of action where the negligence of the plaintiff, if an adult, or if an infant, as here, the negligence of the parent or person standing *in loco parentis*, materially and proximately contributed to the injury.

2. The jury, in response to the special issues submitted to them, found that neither the infant plaintiff nor his parents were chargeable with negligence which contributed to the injury of the plaintiff; the defendant moved the Court below

for a new trial, on the ground that the evidence did not support the verdict in these respects. The motion was denied in the Court below. We think it should have been granted.

The plaintiff, an infant of some six years, seems to have been permitted by his parents to make use of the roadway of the defendants as a playground and to lie down on the railroad track unattended. As to whether he was asleep upon the track, or awake, there is some conflict in the evidence. But this is not material—for in either case such conduct amounted to negligence *per se*, which would defeat a recovery by the plaintiff here. It should be observed in this connection, that there is no evidence whatever of the lack of diligence and due care upon the part of those in charge of the train. The plaintiff was lying on the track, parallel with the rails; he was discovered by the engineer and lookout at some distance ahead, but, notwithstanding a continued scrutiny exercised by them, they were unable to discern that the object at which they were looking was other than a bush or some insignificant obstruction upon the track. When they did discover that a child was lying there, they used every endeavor to slow up the train, but it was then too late to prevent the accident by any, even the utmost effort upon their part. Under the circumstances, as now appearing in proof, we are constrained by the settled rules of law, applicable to cases of this character, to hold that the plaintiff ought not to have recovered for the injuries sustained by him.

Judgment and order reversed and cause remanded for a new trial.

[No. 5189.]

[Filed April 1, 1878.]

LUCE vs. ZEILE.

PAROL CONTRACT FOR PAYMENT OF MONEY.—Claimed to be void under Statute of Frauds.

STATEMENT OF FACTS.

This is an appeal from the judgment of the Court below, and order of the same denying appellant's motion for a new trial thereof, the latter relying in support of his appeal upon the following points: That there are no findings of law or fact to support said judgment—and further, that the evidence is insufficient to justify the verdict and decisions, the same being contrary to law.

It appears from testimony that plaintiff had contracted with

one McCormick to thresh wheat on defendant's ranche near Rio Vista and that after working twenty or more days he came to San Francisco to talk to defendant about the work, when he was referred to defendant's brother in relation to the matter, whom he informed that not having been paid by McCormick he would do no more work unless he knew when he was going to get paid for it, when the brother, John Zeile, told him that when the work was done, upon presentation of an order from McCormick for the amount due, he would pay it. Thereupon he finished the work, and procured such order for the whole amount of labor performed under his contract both with McCormick and Zeile.

It is alleged that the contract relied upon was a *parol* contract, to answer in part for the debt of another. Such contract being void under the Statute of Frauds, the Court erred, and defendant claims a new trial.

W. M. Stewart and *J. W. Carter*, attorneys for defendant and appellant.

I. S. Taylor, attorney for plaintiff and respondent.

OPINION BY THE COURT.

It does not appear how much of the claim for which the plaintiff recovered accrued before, or how much accrued after the failure of McCormick, and the alleged conversation had by the plaintiff with Dr. Zeile and John Zeile.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5744.]

[Filed April 1, 1878.]

PULLIAM ET AL. VS. CHEROKEE FLAT BLUE GRAVEL COMPANY.

TITLE TO MINING CLAIM.—*Held*, that filing application for title in U. S. Land Office does not show exercise of control over premises.

STATEMENT OF FACTS.

In answer to plaintiffs' complaint, the defendant answers with denial of their title and setting up title in itself. On the trial plaintiffs proved location of the ground in 1864 by themselves and others, under whom they held. They also proved that from June, 1870, to February, 1872, they were engaged in running a tunnel, about a thousand feet long, for the purpose of working this and other ground owned by them. Defendant set up title under a sale on execution in 1866, against

parties who claimed a location of ground in 1858. Findings and judgment being for defendant,—plaintiff moved for a new trial which was denied, and appeal taken.

Belcher & Belcher, attorneys for plaintiffs and appellants.

P. O. Hundley and J. M. Burt, attorneys for defendant and respondent.

OPINION BY THE COURT.

The corporation defendant was permitted, against the objection of the plaintiff, to prove that it had made an application at the United States Land office to obtain the title to the premises in controversy. The avowed purpose of this proof was to show that the defendant had exercised control and dominion over the premises. But the circumstances that such an application had been filed in the Land Office did not tend, even in the most remote degree, to show the exercise by the applicant of control over the premises.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5205.]

[Filed March 26, 1878.]

THE PEOPLE vs. LATHAM.

ACTION FOR RECOVERY OF DELINQUENT TAXES.

Provisions of Act of March 28, 1874, resisted on ground of conflict with constitutional provision declaring the uniformity of all laws of a general nature and equality and uniformity of taxation. *Held*, that by a provision of the State Constitution, the value of the property is not required to be ascertained after the passage of Act fixing rate of taxation.

STATEMENT OF FACTS.

The State tax levied by the Board of Equalization of the State was fifty cents on the hundred dollars for the twenty-fourth and also for the twenty-fifth fiscal years,—which tax was declared void and uncollectable by the decision of the Supreme Court in the case of *Houghton vs. Austin*, 47 Cal., 646, rendered at the January Term, 1874.

The Legislature on the 28th of March, 1874, levied the tax for each of the fiscal years, although they had expired, providing that these taxes should have the same force and effect, "as if they had been levied by statute passed, and in force before the commencement of these years," and also validating the assessment books for those years, but prescribing that the tax levied under this act should not be collected from persons who had paid the tax declared unconstitutional by this

Court, whose names and property should be excluded from the delinquent list to be made from the original roll,—a penalty of twenty-five per cent being affixed for non-payment of the taxes before the first Monday of July, 1874.

The Controller of State was directed to employ counsel in the enforcement of the collection of these taxes, either by civil action, "as such actions are prosecuted on express contracts for the direct payment of money, made and payable in this State,"—"or by actions to enforce the lien of the assessment as mortgage liens are enforced."

It is claimed on the part of appellant that this suit was not brought in either of the modes prescribed, and if it were, the Act of March 28, 1874 is unconstitutional and void, being in contravention of section 11 of Article I of the Constitution, which says: "All laws of a general nature shall have a uniform operation,"—and is also in direct violation of section 13 of Article II, which declares that: "Taxation shall be equal and uniform throughout the State," both of which require that taxation shall not only be uniform throughout the State, but that all laws levying general taxes shall be uniform in their operation. While the law before referred to is general, it does not require all persons to pay the taxes which it levies, it being claimed that excusing parties who had voluntarily paid taxes which had never been levied rendered the Act null and void, it being impossible to give validity to a non-existent tax by any legislative enactment. An unconstitutional law being deemed to have no existence upon the statute-books—an unconstitutional tax is one which never has been levied,—which no officer is vested with a right to collect or tax-payer obliged to pay. It is also claimed on the part of appellants that the Act in question also embraces the concluding portion of section 13 of Article II, which provides that: "All property of this State shall be taxed in proportion to its value, to be ascertained as directed by law." The rule laid down in *Reed vs. Omnibus R. R. Co.* (33 Cal., 213) is cited as applicable to this case: "A clause in an Act containing an unconstitutional provision, will vitiate the whole Act, if it enter so entirely into the scope and design of the law that it would be impossible to maintain it without the obnoxious provision."

The property delinquent was not sold at all, but was returned unsold for want of bidders, whereupon a personal judgment was entered against the defendant for the whole tax, which judgment it is claimed was erroneous in this that the decree did not authorize a personal judgment against Latham until after the sale of the property, and the application of the proceeds thereof,—which sale never occurred.

Respondent claims that the Act cited was equal in its operation, because it levied a tax of fifty cents on each one hundred dollars of property subject to taxation,—and denies that certain persons and property are excused from its payment. In answer to the point that the personal judgment was erroneous, the rule laid down in *Lewiston vs. Swan*, 33 Cal., 483, is cited: "That if it appears from the Sheriff's return that the proceeds are insufficient to satisfy the amount due, judgment can then be declared against the defendant."

George Cadwallader, attorney for defendant and appellant.
P. Dunlap, attorney for plaintiff and respondent.

OPINION BY THE COURT.

Action to recover delinquent taxes, levied by the Act of March 28, 1874 (Statutes 1873-4, p. 745) for the twenty-fourth and twenty-fifth fiscal years.

The tax is attacked on the ground that it violates section 11, Article I of the Constitution—"All laws of a general nature shall have a uniform operation;" and also section 13, Article II—"Taxation shall be equal and uniform throughout the State." The objection cannot be sustained, for the statute purports to levy a tax upon all property in the State, subject to taxation for each of those fiscal years.

The Constitutional provision that "All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law," does not require the value of the property to be ascertained after the passage of the Act fixing the rate of taxation. That requirement is satisfied by the ascertainment of the value of the property as directed by law; and the Legislature may levy the tax, either before or after the value of the property is ascertained, without any violation of the fundamental rules upon which taxation is based, or indeed any rule of sound financial policy.

No portion of the property liable to taxation for those fiscal years is exempted from taxation. The provision in the Act, that the several amounts which have been paid on the property, in pursuance of a previous invalid levy of taxes, should be credited as a payment, *pro tanto*, of taxes levied by this Act, does not amount to an exemption of such property from taxation; and if that provision of the Act should be construed as intending that such property would be exempt from taxation, the provision should be void, because in violation of the Constitutional provision that *all* property in the State shall be taxed in proportion to its value.

We see no error in the proceedings or judgment,

Judgment and order affirmed. Remittitur forthwith.

We dissent,

WALLACE, C. J.

MCKINSTRY, J.

[No. 5159.]

[Filed March 26, 1878.]

MCCARTHY vs. POPE.

APPLICATION OF STATUTE OF FRAUDS.

An agreement by parol to make a purchase,—and subsequent parol agreement to transfer to a third party the benefit of the same, not within Statute of Frauds. Any benefit derived from said third party from such transaction renders him liable on his contract to pay for the same.

STATEMENT OF FACTS.

On his opening statement to the jury plaintiff was non-suited. From this statement it appears that one Richardson was the owner of real estate for which the plaintiff made a parol agreement to purchase for \$200,000. Plaintiff not being able to raise that sum, made a subsequent parol agreement with defendant, for a certain sum, to give him the benefit arising from this bargain, whereupon Richardson, by his direction, executed a deed to defendant for the property, but after getting the deed defendant refused to pay anything to plaintiff whereupon the latter brought his action upon the *implied promise* to pay what the purchase was reasonably worth. Upon these facts the Court below non-suited the plaintiff—on the authority of *Mayer vs. Child*,—holding that the plaintiff's right of purchase from Richardson was void, because the same was not in writing,—and consequently there was nothing for plaintiff to assign to defendant,—and therefore there was no consideration for any promise by defendant to pay anything to plaintiff.

Appellant claims that *Mayer vs. Child*, upon which plaintiff was non-suited in the Court below is no authority for respondent,—and that the moment that Richardson performed his agreement by conveying to defendant, the defect was cured, defendant deriving as much benefit from it as if the agreement had been in writing. It is contended that the general principle is, that although a contract may be within the Statute of Frauds, or void from any cause, yet that after it has been performed it becomes valid: *Pico vs. Cuyas*, 47 Cal., 179; *Grove vs. Hodges*, 55 Pa. St., 516; *Abel vs. Douglas*, 4 Denio, 311; *Storm vs. U. S.*, No. 23, Oct. Term, 1876, U. S. Sup. Court.; *Adams vs. Honness*, 52 Barb., 334.

Pringle & Hayne, attorneys for plaintiff and appellant.
Jarboe & Harrison, for defendant and respondent.

OPINION BY THE COURT.

The case of the plaintiff is not like that of *Mayer vs. Child* (47 Cal., 142), as supposed by the Court below. In that case the vendor of the stock repudiated the alleged contract, and so the transaction turned out to be of no benefit to the defendant there. But here the defendant did obtain an advantage, and acquired the title to a large property by means of the contract made by him with McCarthy, and upon which this action is brought.

We think that the views expressed by Lord Chief Justice Best, in *Seaman vs. Price* (10 Moore), and by the Supreme Court of the State of Missouri, in *Kratz vs. Stocke* (42 Mo., 351), are appropriate to the case before us, and upon the principles maintained in those cases the judgment below should be reversed here.

Judgment reversed and cause remanded for a new trial. Remittitur forthwith.

RHODES, J., expressed no opinion.

[No. 2490.]

[Filed March 27, 1878.]

DORN vs. HOWE.

VALIDITY OF HOMESTEAD CLAIM.—Actual residence at the time of filing the declaration necessary to constitute a homestead.

STATEMENT OF FACTS.

Plaintiff's title to the premises in dispute is derived from certain sales made under execution. Defendant sets up that the same were at the time of execution of such sales a homestead,—the only question therefore presented by the record is, was defendant's claim of homestead a valid one.

The Court below found that at the time of filing of defendant's claim of homestead he was not residing on the land designated.

J. K. Alexander and *S. M. Swinnerton*, attorneys for plaintiff and appellant.

W. H. Webb, attorney for defendant and respondent.

OPINION BY THE COURT.

The defendant was not residing on the premises in controversy at the time the declaration of homestead was filed. An actual residence thereon *at the time of the filing of the declar-*

ation is required by the statute (Civil Code, sec. 1263). The statute has been so construed here in several cases—the latest of which is Babcock vs. Gibbs (No. 5669), at the last October Term.

Judgment reversed and cause remanded, with directions to render judgment for the plaintiff, in accordance with the prayer of the complaint.

[No. 5666.]

[Filed April 2, 1878.]

ESTATE OF FREY.

MISNOMER.—Letters testamentary issued to a party other than named in the order of Court, declared to be void. The party acting under the same not entitled to commissions in the settlement of the estate. A testator has power to dispose of only one-half of common property. A surviving wife, by receiving letters testamentary, and by taking under the will, does not thereby renounce her right to half the common property.

The facts appear in the opinion.

OPINION BY THE COURT.

The letters testamentary issued to Jacob Frey were unauthorized and void, for the reason that the order directed letters to be issued to the petitioner, *Joseph Frey*.

The letters testamentary issued to Jacob Frey being void, he was not entitled to commissions, fees or charges as an executor in the settlement of the estate of said testator.

If the property in this case was common property (on the argument it was so conceded), the testator had power to make a testamentary disposition of only one-half thereof, subject to the payment of debts, and the remaining half would vest in the surviving wife of the testator. The surviving wife, by applying for and receiving letters testamentary, and by claiming and taking under the will, will not be deemed to have renounced her rights to the one-half of the property as common property.

Order reversed and cause remanded for further proceedings in accordance with this opinion.

[No. 5687.]

[Filed March 26, 1878.]

SNOW vs. KIMMER.

TRESPASS.—WHEN ACTION CANNOT BE MAINTAINED.—When defendants are

in adverse possession—claiming the right of possession—the plaintiff cannot maintain action for trespass.

OPINION BY THE COURT.

The findings show that at the time of the commission of the alleged trespasses the defendants were in the adverse possession, claiming the right to the possession of the tract of land upon which the alleged trespasses were committed, and still continued in possession at the time of bringing the action.

Under these circumstances the plaintiff cannot maintain an action of trespass, or a bill to prevent the commission of supposed acts of trespass on the premises by the defendants.

Judgment affirmed.

[No. 5469.]

[Filed March 27, 1878.]

STANWAY vs. RUBIO.

STATEMENT OF FACTS.

The plaintiff, Stanway, deraigned title from one Miguel Moro, who with others, agreed with Geo. Dalton and Manuel Abril, parties of the first part, to purchase section 9, of township 2 south, range 13 west, in the county of Los Angeles, as lieu lands from the State, and when a patent for the same was obtained, to execute deeds, in severalty, to said parties, for any or all of said lands which might be occupied and in possession of the parties of the second part. The defendant, Rubio, was not made a party to this agreement, but claims title through a party who purchased from Abril.

J. D. Bicknell and *J. R. McConnell*, attorneys for plaintiff and appellant.

Lindley & Thompson, for defendant and respondent.

OPINION BY THE COURT.

At the trial plaintiff claimed to deraign title from Moro, who, so far as the record shows, never had any right, interest or estate in the demanded premises. The lands in controversy are neither included within the fences or inclosures of any of the parties of the second part to the agreement of April 9, 1868, nor within the lines of the respective possessions of said parties as *surveyed* by Hansen, County Surveyor, or as indicated by the green lines upon the Hansen map.

Judgment and order denying new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 10,313.]

[Filed March 28, 1878.]

THE PEOPLE vs. WONG SHU SHUT.

CRIMINAL LAW—MURDER.—Record must show evidence of death of party alleged to have been killed.

The facts appear in the opinion.

OPINION BY THE COURT.

The defendant was convicted of the crime of murder in the first degree, and moved for a new trial on the ground, amongst others, that the verdict was contrary to the evidence, and the motion having been denied, he brings this appeal.

Upon a careful examination of the record, no evidence is found tending to show the death of the person alleged to have been killed by the prisoner. The practice to be pursued by the District Attorney in the settlement of bills of exceptions in criminal cases where a motion of this character has been denied, was pointed out in *People vs. Fisher* (51 Cal., 319), and upon the authority of that case the judgment and order denying a new trial must be reversed and the case remanded for a new trial, and it is so ordered.

[No. 5802.]

[Filed March 29, 1878.]

NISBET vs. NASH.

PARTNERSHIP.—Was the partnership of plaintiff dissolved,—in which event an uncertainty must follow—if not dissolved it is incumbent on the Court to find whether plaintiff is entitled to a decree of dissolution—in the event of which an accountability should also be ordered.

OPINION BY THE COURT.

The Court erred in finding that plaintiff and defendants were not mining partners. They were.

The Court should have found, whether or not the partnership had been dissolved.

If on a re-trial, the District Court shall find that the partnership has been dissolved, the decree must be for an accounting. If the Court shall find that it has not been dissolved, it will become its duty to determine, whether or not, plaintiff is entitled to a decree of dissolution; and if it shall find that plaintiff is entitled to such decree, the decree should also provide for an accounting.

It is not necessary to determine, whether John Nisbet is a necessary party to this action or any accounting.

Judgment and orders denying new trial reversed and cause remanded for a new trial—each party to pay one-half of the costs of these appeals.

[No. 5789.]

[Filed April 3, 1878.]

BARBER vs. BARNES.

LAW OF PARTNERSHIP.—Failure of a firm to do business after attachment of property to pay creditors of the same, does not constitute a dissolution of partnership—the subsequent bringing an action to recover a debt due the firm tends to rebut any inference of such dissolution.

OPINION BY THE COURT.

The Court granted a non-suit on the ground that the cause of action was barred by section 339, Code of Civil Procedure. The seizure of the partnership property under the attachment mentioned in the record, and the application of the property to the payment of the creditors of the firm, and the fact that the plaintiff and defendant "did not do business after the attachment was levied" did not of themselves necessarily and conclusively operate as a dissolution of the partnership. The commencement of the action by the plaintiff and defendant against Hunt & Anderson to recover a debt alleged to be due to the firm—the action not yet having been determined—tends to rebut any inference of the dissolution of the partnership arising from the facts above stated. It is unnecessary to decide whether the statute will run against a bill for an accounting from the time of the dissolution; nor if it does not run what section of the Code would be applicable to such a case.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 5774.]

[Filed April 1, 1878.]

WATSON vs. CORNELL.

STATEMENT OF FACTS.

Plaintiff had judgment for \$500 damages and injunction a prayed for. Judgment was reversed, on appeal,—the case being remanded back with instructions to find if it could be

done from evidence taken on the trial, on all the material issues, and if not to try the case anew. Pending appeal there was a change of Judges in the District,—the new Judge upon the retrial of the case made entire new findings, and rendering judgment for defendants, dismissed the case at plaintiff's costs.

E. V. Spencer, attorney for plaintiff and appellant.

P. O. Hundley and *J. S. Chapman* attorneys for defendant and respondent.

OPINION BY THE COURT.

The record does not contain a copy of the undertaking on appeal, nor does the certificate of the Clerk, as far as it relates to the undertaking on appeal, conform to section 953 of the Code of Civil Procedure.

Appeal dismissed, without prejudice to another appeal.

Notes of Unwritten Opinions.

IN the case of *Wallace vs. Miller*, in our Supreme Court, the plaintiff complains of Henry Miller, George H. Moore, E. A. Davidson, John Paine and Oscar Reeves, defendants, and for cause of action alleges ownership in fee and actual possession of an undivided interest of seven hundred and fifty acres in Rancho los Animas, in Santa Clara County, equal to one twenty-eighth part of said rancho, from which, on the 28th of December, 1876, he was unlawfully ousted by said defendants, to which defendants made general denial. The Court below found that plaintiff was the owner in fee to said seven hundred and fifty acres described in his complaint, and entitled to the possession of the land. It was ordered that the judgment herein be and the same is hereby modified by striking therefrom wherever they occur, the words "one twenty-eighth part," and inserting in lieu thereof the words "seven hundred and fifty twenty one thousand three hundred and sevenths;" and in other respects the judgment and order denying the defendant's motion for a new trial are affirmed.

IN the case of *Read vs. Mahoney*, the appellant contends

that there was no error as alleged in the bill of exceptions in the admission of the plaintiff's patent in evidence. The ground of the objection was that the land was within the boundaries of the city and county of San Francisco, and therefore not subject to pre-emption, and that it was issued without authority of law and is void. The patent, which is regular in form, recites that Frances Read purchased the land and made full payment. The patent was valid, and even if it were not, defendant was not in position to question it nor was that in issue. The Court ordered a reargument.

IN the case of Strother vs. Diefendorff, the defendant and appellant deemed it important on the trial to show the boundaries of the "Casement Tract," as the same existed from and after March 27, 1854, offering and producing evidence to show what was the back line of said tract,—which was admitted, subject to the objections of relevancy by plaintiff's counsel. In the consideration of the case the Court below held that such testimony was irrelevant, on the ground that the Casement tract of the Jimeno grant must be confined to the latter as located and limited in the final survey as conveyed in the patent of the grant, to which ruling defendant excepted, claiming that such evidence being excluded, there remained no evidence showing what was the rear line of said Casement tract,—and that judgment should have been made for the defendant.

Legal Notes.

OMITTED.—Owing to the large number of decisions lately filed, much valuable matter is crowded out of this number, including our "Digest" of *former opinions*. Our Supreme Court has *showered* its decisions—all at once.

SESSIONS OF THE SUPREME COURT.—The law passed at the last session of the Legislature provides that after October next the January and July terms of the Supreme Court shall be held in San Francisco,—the April and October terms in

Los Angeles, and the May and November terms in Sacramento. The April term of the Court under the old law commences at Sacramento on Monday next, the 8th inst. See calendar on cover pages.

SUPREME COURT CLERK'S FEES.—An amendment to the Political Code, passed by the last Legislature, provides that in addition to the fees heretofore charged by the Clerk of the Supreme Court, there will be a fee of \$5 for filing petitions for rehearing and \$1 for filing orders extending the time of transcripts on appeal,—the amendment to take effect immediately.

DEATH OF A DISTRICT JUDGE.—News was received in this city on Thursday night, that Warren T. Sexton, Judge of the Second Judicial District, died at his residence in Oroville at 4 o'clock the same afternoon. He had been ill for several months but had been able to hold Court up to the 16th of March. He was universally respected, and such was the confidence reposed in him by the people of his District that he had held the position of District Judge with the exception of a single term since 1856.

Recent U. S. Land Decisions.

WOMEN AS LOCATORS.—The law makes no distinction in the matter of locating mining claims on account of sex.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE,
WASHINGTON, D. C., Nov. 13, 1877. }

Register and Receiver, Eureka, Nevada:

GENTLEMEN:—Referring to your letter of the 14th of September last, I have to state that section 2319 of the Revised Statutes of the United States declares that the mineral lands of the United States shall be free and open to exploration and purchase "by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law." The law makes no distinction in this regard on account of sex.

Mining claims may be located and held by either males or females upon compliance with law. Very respectfully, your ob't serv't.

—*Opp's Land Owner for March.* J. A. WILLIAMSON, Commissioner.

OUR column of Interior Court Notes was prepared this week, but we are compelled to leave it out by the pressure of recent decisions. We intend to make this department a valuable one and shall only omit it for more important matters.

CALIFORNIA LEGAL RECORD.

VOL. I.

APRIL 13, 1878.

No. 3

Legal Notes.

ADMITTED TO PRACTICE.—In the Supreme Court at Sacramento on Tuesday the following gentlemen were admitted to practice: Chas. W. Kitts, A. Burrows, Benjamin Teal, John J. Boyce, Peter Hannan, Vincent Neale, John F. Ellison and W. B. C. Brown, State Controller.

SUPREME COURT REPORTER.—By an act of the last Legislature the appointment of Reporter of the decisions of the Supreme Court of this State, was taken from the Judges of the Court and vested in the Governor. Hon. Gideon J. Carpenter, of El Dorado, who represented that county as Assemblyman for two terms, during the last of which, two years since, he filled the responsible position of Speaker, has been selected to fill this important office for four years. The new appointee is an old resident of California, is an able lawyer, and will undoubtedly discharge the arduous duties of his position satisfactorily to all parties.

A GOOD APPOINTMENT.—Governor Irwin has appointed Hon. James D. Thornton of this city to be the Judge of the Twenty-third Judicial District newly created out of the Third and Twelfth Districts. Judge Thornton is a native of the State of Virginia. He became a resident of this city in 1854 and has since that time been practicing his profession here. With no desire to undervalue the claims of the numerous gentlemen who were highly recommended as worthy to inaugurate this new Court, we but express the general opinion of the profession and people, when we say that a more acceptable appointment could not have been made.

Supreme Court of California.

[January Term, 1878.]

[No. 5057.]

[Filed April 5, 1878.]

COX vs. McLAUGHLIN.

[Impleaded with the Western Pacific Railroad Company.]

CONTRACT—PERFORMANCE OF.—Where a variance occurs in the performance of a specific contract, under an implied promise of reasonable payment for work actually done, and the contract has, so far as performed, been *specifically* done,—the contract may ordinarily be introduced as evidence of value.

PREVENTION OF.—Unless prevention by defendant be proved and found, plaintiff cannot recover on an unfulfilled contract. A failure to pay an installment on contract when due, does not constitute prevention, nor authorize the other party to abandon work and recover all the benefit that would result from a full performance.

MOTIVE OF PREVENTION.—Rights of parties under contract not affected by the motive inducing refusal or neglect of payments of stipulated instalments.

STATEMENT OF FACTS.

The defendant and appellant in this case, Charles McLaughlin, the original contractor for building the Western Pacific Railroad from San Jose to Stockton,—entered into a contract with plaintiffs and respondents to construct the twenty-one miles of said road between San Jose and Alameda Canyon. While the work was going on, the Western Pacific sold out to the Central Pacific Railroad Company, who were the owners of the road at the time of the commencement of this action. After several demurrers to the complaint which were sustained,—the case was tried on its merits, resulting in a judgment lien for the plaintiffs of \$194,283.80, which was reversed on appeal and the case remanded back for a new trial, on the ground that no action to enforce a lien would lie until the *entire* contract had been performed. (Cox et al, vs. W. P. R. R. Co., 44th Cal. Reports, p. 28.) On the new trial defendant's demurrer to plaintiffs' complaint was sustained, followed by a judgment of dismissal, which was sustained on appeal so far as related to the railroad companies, but reversed as to McLaughlin. (47 Cal. Reports, p. 28.) A re-trial resulted in a judgment for plaintiffs rendered June 21, 1875. On the overruling of his motion for a new trial, defendant appeals, setting forth various causes—among others misjoinder of parties plaintiff,—and non-joinder of parties defendant,—averring that Timothy Dame and William J. Lewis were interested with plaintiffs in their contract. Defendant and appellant further claims that owing to fraud and collusion, no action on the contract could be maintained,—and that on the contrary he would be entitled to recover back the money he had already paid.

McAlister & Bergin, J. B. Felton and M. G. Cobb, attorneys for plaintiff and respondent.

Campbell, Fox & Campbell, Tully R. Wise and S. M. Wilson for defendant and appellant.

OPINION BY THE COURT.

If after this cause shall have been remitted to the District Court the plaintiff shall ask, and the Court shall permit an amendment of the complaint by the insertion of an averment of the actual work done, it will remain for plaintiffs to *prove* the actual value.

Where a variance has occurred in the performance of a specific contract, under such circumstances as will enable a plaintiff to maintain an action on the implied promise to pay the reasonable value of the work actually done, and the contract, so far as it has been performed, has been performed *in accordance with the specifications* therein contained, the contract may ordinarily be introduced as evidence of value.

But whether, when the contract provides for an arbitrary and merely conventional standard of determining what work has been done, an appeal to which does not show what work has in fact been done, the contract is admissible as evidence of the actual value, is not a question, an answer to which is necessary to the determination of this appeal.

When this cause was here on the first appeal, this Court held the contract between McLaughlin and Cox, Myers & Co. to be an *entire* contract, and said: "It is not alleged in the complaint that the work contracted to be performed has been completed, nor that its performance has been *prevented* by McLaughlin, or that the contract has been rescinded." (44 Cal., 27.)

After the cause was returned to the District Court, the plaintiffs, adopting the suggestion of the Court, amended their complaint by inserting the averment that defendants had "prevented" the completion of the work. There can be no doubt, as we intimated at the former hearing of this appeal, that the complaint, as amended, is an attempt to declare specially upon the contract, in part—performance and prevention.

The fact that it does not allege damages by reason of loss and profits on the whole job does not change the character of the pleading, nor of the proof necessary to sustain it. Unless prevention was proved and found, the plaintiffs were not entitled to recover anything on the *contract*.

The *ninth* is simply a finding that defendant did not pay plaintiffs their money, as it became due. We have nothing to add to what we have already said in respect to this *finding*, except that the language, that defendant neglected and refused to pay, "well-knowing that plaintiffs had to rely on the moneys received from him," adds nothing to its effect. Even if, under any circumstances, the failure to pay would authorize

the plaintiffs to cease work and bring suit on the contract (the parties having omitted to insert a provision in the written contract that such failure should constitute prevention), there is no finding that defendant knew *at the time the contract was entered into*, that plaintiffs relied entirely on his payments to them, or that such reliance was an inducement to the contract on their part. It is manifest that the *motive* which induced him to refuse or neglect payment cannot affect the rights of the parties under the contract.

There is no finding, in general terms, that defendant "prevented" plaintiffs from performing their contract fully. Nor is there any finding, or evidence tending to prove, that he *failed entirely*, or prevented, by notifying plaintiffs that he would pay none of the installments as they should become due.

We are, therefore, brought again to the question. In cases like the present, will the *mere* failure or refusal to pay an installment as it becomes due, authorize the other party to abandon the work, and yet to bring suit for the recovery of all the benefit he would have received had he fully performed; that is to say—the contract price up to the time the work ceased, and such profits as he would have made, had he performed his contract in all respects?

An examination of the cases cited by plaintiffs' counsel has not satisfied us that such mere failure to pay has ever been held to be prevention.

In *Withers vs. Reynolds*, 2 Barn. and Ad. 882, Patterson, J., said: "If the plaintiff had merely failed to pay for any particular load, that of itself, might not have been an excuse to defendant for delivering no more straw; but the plaintiff here expressly refused to pay for the loads as delivered." The case was commented on in *Franklin vs. Miller*, 4 Ad. and Ell. 599. Coleridge, J., there said: "In *Withers vs. Reynolds*, each load of straw was to be paid on delivery."

"When the plaintiff said that he would not pay for his loads on delivery, that was a *total failure*, and defendant was no longer bound to deliver." (See note to *Cutter vs. Powell*, 2 Smith's Leading Cases.)

In *Masterton vs. Mayor of Brooklyn* (7 Hill, 64, 65), the plaintiff having continued to furnish marble, as required by his contract, up to a certain date; the defendants suspended operations upon the building, *and refused to receive any more materials of the plaintiffs, though the latter were ready and offered to perform.*

Canal Company vs. Gordon (6 Wall, 561), construes a statute of California in respect to mechanics' liens, and holds that

where a contract is to complete a structure, with agreements for installment payments, a failure to make a payment at the time specified, justifies an abandonment of the work, and entitles the contractor to receive a *reasonable compensation* for the work actually done.

In *Hale vs. Trout*, 35 Cal., 242, there was prevention, or total refusal. Sawyer, J., said: "There was not merely a neglect of payment, but plaintiffs were notified by the defendants that *they should treat the contract as at an end, and would receive no more lumber under it.*"

Cort vs. Ambergate Railway Company. This case is reported in Langdell's Select Cases on Contracts, 970. Lord Campbell said: "On the whole, we think we are justified on principle, and without trenching on any former decision, in holding that when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, *gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them*, the vendor having been *desirous and able to complete the contract*, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract."

Jones vs. Barkley (2 Douglass, 684), and *Ripley vs. McClure* (4 Exchr., 344), simply hold that where an act is covenanted to be performed by each of two parties at the same time, he who is ready and willing to perform may be *discharged* of performance by the other, and, if so discharged, may maintain his action on the contract.

None of the cases above referred to declare the proposition that failure to pay an installment on a contract of the kind here sued on will authorize an action like the present.

For the reasons mentioned in the former and present opinion, the judgment and order denying new trial are reversed, and the cause remanded for a new trial.

[Wallace, C. J., and Crockett, J., did not participate in this decision.]

[No. 5829.]

[Filed April 10, 1878.]

IN THE MATTER OF THE ESTATE OF T. JEFF.
WHITE, DECEASED.

On appeal from Probate Court of Los Angeles county.
Katie M. Bachman, Testamentary Executrix and appellant.
Virginia R. Green, petitioner and respondent.

A STATEMENT OF THE CASE.

T. Jeff. White died April 12, 1876, in Los Angeles, aged 27, leaving a will, dated March 10, 1877, which gives an undivided half of all his property to his infant son, T. Jeff. White, Jr., and to Katie M. Bachman the other undivided half of all, and appoints her sole guardian of the person and estate of the infant son, and Executrix of the will without giving bond. This will was duly probated and she qualified.

On July 7, 1877, Virginia R. Green was appointed guardian by the Court. The estate was found to be indebted over \$6,000, while many of its assets proved to be of small value, so that the personal property would not pay the debts, requiring real estate to be sold for that purpose. Hence, V. R. Green, as guardian, asks for a bond from Katie M. Bachman, and the Court orders a bond for \$8,000, with two sureties, and on August 13, 1877, revoked her letters testamentary. From this she appeals on September 18, 1877. She had approved claims against the estate amounting to \$1,626.50 and rejected \$5,687.74.

Hertman & Haley and A. J. King, attorneys for appellant.

Thompson & Ellis, attorneys for Virginia R. Green.

OPINION BY THE COURT.

Section 1396 of the Code of Civil Procedure provides that when letters have been issued without bond, a bond may nevertheless be subsequently required, when it appears from any cause necessary or proper.

Section 1401 provides that a sworn petition may be presented setting forth waste by the executor and praying that he be required to give bond, and that, when such petition is filed, the powers of the executor may be *suspended* until the matter can be heard and determined. This section in no way conflicts with section 1396, which gives the Probate Court the general power to require a bond in proper cases.

Order affirmed.

[No. 5578.]

[Filed April 4, 1878.]

WETZLAR vs. FITCH.

On appeal from the 14th District Court, Placer county.

PROBATE COURT—JURISDICTION OF.—Has no jurisdiction to receive or act in any way upon an account presented by an Executor of the estate of a deceased Executor of another estate which account was unsettled at the time of his death. (*Bush vs. Linsev*, 44 Cal., 121.)

STATEMENT OF FACTS.

The petitioner, Julius Wetzlar, was the survivor of three Executors of the estate of John C. Keenan, deceased. Keenan had been the Executor of the

estate of his deceased wife, Rosanna H. Keenan, who left a will, and a minor heir, Geo. B. Keenan. When John C. Keenan died, his wife's estate was unsettled, and no account had been rendered, but he had expended \$5,565.80, in legacies, maintainance and education of the son, taxes, repairs, and insurance, and interest on money borrowed and used for the estate. He left a will, which was admitted to probate, and his estate is still in probate and unsettled.

On December 29, 1876, plaintiff Wetzlar, filed the account of John C. Keenan in Probate Court against the estate of R. H. Keenan, for \$9,481.93, with vouchers. The Court denied the motion for a hearing, and plaintiff obtained a writ of mandate from the 14th District Court to compel a hearing. From this order, the Probate Judge, J. Ives Fitch, appeals to the Supreme Court, claiming that the District Court has no jurisdiction, as the Probate Court is not "an inferior Court," and that there is no law requiring a Probate Judge to give hearing to the account of a deceased Executor, and that Wetzlar should have presented his account to the new Administrator of the R. H. Keenan estate, and finally that this order would give the District Court Appellate power.

George Cadwalader, attorney for petitioner and respondent.

Hale & Craig, J. M. Fuchseler, and *Du Brutz & Dickinson*, for defendant and appellant.

OPINION BY THE COURT.

The Probate Court had no jurisdiction to receive, or in any way to act upon the account presented by the petitioner as executor of John C. Keenan, deceased (*Bush vs. Linsey*, 44 Cal., 121).

It is not necessary to decide whether the Probate Court is an "inferior tribunal" to which *mandate* may issue out of the District Court.

Judgment reversed and cause remanded with directions to dismiss the action and proceedings.

[No. 5671.]

[Filed April 3, 1878.]

BILLINGS vs. DREW.

On appeal from the Sixth District Court, Sacramento Co.

INSTRUCTIONS TO JURY—WHEN ERRONEOUS.—Parties to an action have a right to both affirmative and negative pleadings; and instructions must not be given by the Court to find a verdict based on the one that will deprive the party of any benefit contained in the other.

SAME.—Affirmative or negative matter, separately pleaded, does not operate as a waiver or withdrawal of other portions of the pleadings. (*Buhue vs. Corbett*, 43 Cal. R., 264.)

STATEMENT OF FACTS.

The defendant, M. M. Drew—as Sheriff—seized, by attachment, in behalf of E. M. Skaggs, certain saloon property in possession of, and apparently owned

by one A. S. Woods. The plaintiff, E. L. Billings, held a bill of sale from Woods for the property (though Woods continued in its possession and use up to time of the seizure), and brought action to recover value and damages. Defendant *denied his ownership and possession*, and set up that the sale by Woods to plaintiff was fraudulent and for the purpose of delaying and hindering creditors of Woods from obtaining their just debts and particularly E. M. Skaggs. Upon instructions from the Court, the jury gave a verdict for the plaintiff, and the Court denied a new trial and entered judgment. Defendants appealed.

A. C. Freeman and *P. Dunlap*, attorneys for defendants and appellants.

J. W. Armstrong and *Add C. Hinson*, for plaintiffs and respondents.

OPINION BY THE COURT.

The answer of the defendant contained several denials and one averment of new matter relied upon as a defense. The denials were : First—That plaintiff was owner of the personal property mentioned in the complaint. Second—That the plaintiff had, at any time, the possession of said personal property. Third—That the defendants took the property from the possession of the plaintiff. The new matter set up in the answer was to the effect that the property was the property of Woods, and that it was taken by the defendant Drew as Sheriff, by virtue of a writ of attachment issued against Woods at the suit of the defendant Skaggs, and in this connection, and as part of the affirmative defense, it is alleged that the plaintiff claims the property "under and by virtue of a pretended purchase thereof from the said A. S. Woods, and that said pretended sale of said goods and chattels by the said Woods to plaintiff, if made at all, was made fraudulently and for the purpose of hindering and delaying creditors of the said A. S. Woods in collecting their just debts, and particularly," etc.

In this condition of the pleadings the Court below, at the instance of the plaintiff, gave the jury the following instruction :

"The defendants in their answer seek to justify the taking of the property under an attachment issued out of this Court on the 24th day of October, 1876, in an action in which the defendant E. M. Skaggs was plaintiff, and A. S. Woods and John N. Larkin were defendants, which the defendants allege was levied upon the property by the defendant Drew, as Sheriff, as the property of A. S. Woods, and they allege that Billings, the plaintiff, claims to be the owner of said property under and by virtue of a purchase thereof from A. S. Woods, and that the sale by Woods to the plaintiff was made fraudulently for the purpose of hindering and delaying the creditors of said Woods in collecting their just debts, and particularly

the defendant E. M. Skaggs. By these averments the defendants admit that there was a sale of the property by Woods to the plaintiff, which was a valid sale as between Woods and the plaintiff, and as the defendants seek to avoid the sale on the grounds that it was made for the fraudulent purpose of hindering and delaying the creditors of said Woods, the burden of proof is upon the defendant to show affirmatively by a preponderance of evidence that said sale was made by Woods for the fraudulent purpose of hindering and delaying his creditors or the defendant E. M. Skaggs out of his debt; and if the evidence in this case fails to show that said sale was made by Woods to the plaintiff for the purpose of hindering or delaying the creditors of said Woods, you will find a verdict for the plaintiff."

This instruction was erroneous, in that it deprived the defendants of the benefit of the denials contained in their answer. They had the right to set up negative as well as affirmative defenses to the action, and the affirmative matter, separately pleaded, did not operate as a waiver or withdrawal of the denials contained in other portions of the answer. (*Buhne vs. Corbett*, 43 Cal. R., 246.)

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 5299.]

[Filed March 14, 1878.]

GREEN vs. CAMPBELL.

FACTORS—WHEN THEIR CONTRACTS BIND THE OWNER.—Contracts made by third parties with a factor in respect to the property, without knowledge on the part of said party that said factor is not the real owner, will be binding upon the owner. A factor has ostensible authority to deal with the property as his own in transactions with persons not having notice of the real ownership.

STATEMENT OF FACTS.

Green, the respondent, forwarded from Yolo county, certain wheat consigned to E. E. Morgan's Sons, shipping and commission merchants, doing business at San Francisco, to be forwarded to a European port by said Morgans' Sons and there sold by them for account of respondent. The said Morgans' Sons had previously been largely engaged in buying, selling, and shipping wheat to Europe on their own account. Morgans' Sons shipped the aforesaid wheat belonging to Green in their own name, on board of the appellant Campbell's ves-

sel, to be sent to Europe in accordance with the terms of a charter party. Morgans' Sons became insolvent, and Green claimed delivery of his wheat from Campbell, without making tender of freight and charges. Campbell filed an amended answer, setting up that the wheat "was shipped by Morgans' Sons, merchants and factors as aforesaid, in their own name and the usual course of trade, without knowledge or notice on the part of this defendant, of the alleged ownership thereof, by said plaintiff or of the ownership thereof by said plaintiff or of the ownership thereof by any person, or persons, other than said Morgans' Sons." A demurrer to this amended answer was sustained, and Campbell appealed.

McKune & Welty, attorneys for plaintiff and respondent.

Milton Andros and *Chas. Page*, for defendant and appellant.

OPINION BY THE COURT.

The amended answer of Campbell to which a demurrer was sustained set up that the wheat "was shipped by E. E. Morgans' Sons, merchants and factors, as aforesaid, in the usual course of trade, without knowledge or notice on the part of this defendant of the alleged ownership thereof by said plaintiff, or of the ownership thereof by any person other than said E. E. Morgans' Sons."

The demurrer should have been overruled, for under the provisions of the Civil Code (§ 2369) Morgans' Sons, factors of the plaintiff, had *ostensible* authority to deal with the property as their own "in transactions with persons not having notice of the actual ownership."

In this respect the case differs from that of *Green vs. Meyer* just decided.

Judgment reversed and cause remanded for a new trial.

Supreme Court Unwritten Opinions.

THE case of the Farmers' Storage and Commission Company vs. De Lappe is an appeal from a judgment of the District Court of Colusa County to the Supreme Court. The defendant contracted to sell his wheat crop in the field to one Howell Davis, and to deliver the same to his order at plaintiff's warehouse. Defendant delivered the wheat as per agreement in loads, taking cards for each, showing the number of

sacks,—which on the delivery of the last load were handed in to the Secretary who, footing up the amounts, gave him a receipt for the same, which defendant delivered to Davis, receiving pay for 131,995 pounds of wheat, where the actual receipt as shown by the cards was but 111,995 pounds, the Secretary having made the mistake of 20,000 pounds in adding up the amounts. On discovering his error three days after, the Secretary went to the defendant, taking with him the cards and his books, and pointing out the mistake asked defendant to rectify it. On the subsequent delivery of the 340 sacks to Davis by the plaintiff, he then learning the actual weight, demanded the return of the amount paid for the 20,000 pounds called for by the receipt but not delivered,—when plaintiff paid him \$425 and \$30.75 interest,—which amount plaintiff in turn demanded of defendant, and upon refusal this action was brought for the recovery of the same. The Court below found that the payment of the \$425 with interest, was made by plaintiff without the knowledge or consent of defendant at the time and that he had not since then ratified the same;—and also at the time of such payment a negotiation was pending between Davis and defendant for the payment by the latter of the difference between the amount of wheat delivered and that receipted for,—defendant declining to pay such amount unless satisfied by vouchers and statements that Davis was out such amount. That prior to bringing this action plaintiff demanded of defendant the payment of the sum paid to Davis, which was refused, whereupon KEYSER, District Judge, found as a conclusion of law that plaintiff was entitled to judgment for \$455.75 and costs.

IN the case of Unger vs. Roper, action was brought to recover easterly third of fifty-vara lot No. 1,353, on south side of Turk between Hyde and Larkin streets in the city of San Francisco. The answer was a general denial and on trial before Justice MCKINSTRY, District Judge, and a jury a verdict was had for defendant, which verdict plaintiff claims is unsupported by the evidence. Surprise is claimed by the introduction of evidence not true in point of fact,—also that

"there was irregularity in the proceedings of the Court or abuse of discretion whereby the plaintiff was prevented from having a fair trial." Appeal dismissed and order denying new trial affirmed. The opinion filed November 6, 1877 stands as the opinion of the Court.

THE case of Powers vs. Leith, decided on April 10th, presents a tangle of title to land not often seen even in California, and confirms the doctrine that even a United States Patent may be reviewed and controlled by a District Court. The appeal comes up from the 21st District (Lassen county), with J. S. Chapman and J. W. Hendrick, attorneys for plaintiff and respondent, and E. V. Spencer for defendant and appellants. Wm. Leith, the defendant, made a homestead entry of land in Lassen county, on August 1, 1873 (No. 304), in the U. S. Land Office at Susanville. At the same time a controversy was pending on same land between E. W. Bartlett and John Baxter—Bartlett claiming under homestead entry (No. 86) of March 11, 1872, and Baxter as a pre-emption. Hence the new homestead entry of Leith was declared void by the Land Commissioner—that of Bartlett being still uncanceled. Leith being notified of this, and not showing cause, report was made to the Commissioner, who cancelled said entry on April 1, 1874. Bartlett's and Baxter's claims were both also cancelled on March 30, 1874. On June 13, 1874—the land being clear of all claims of record,—the plaintiff, Joseph Powers, filed his declaratory statement for a pre-emption,—alleging settlement March 1, 1874—and he continued to live on and cultivate the land till the fall of 1875, when Leith took possession and excluded him. On July 13, 1874,—just one month after Powers' filing of his declaratory statement—Leith made a second homestead entry (No. 391), on the land, and on July 30th forwarded an affidavit to the Land Commissioner alleging entire good faith in his first homestead entry and no knowledge of any dispute of title, and asking that his second entry be set aside, and his first re-instated, as he had made valuable improvements, and which the Commissioner,—without notice to Powers, but entirely *ex parte*,—did. Upon learning this, Powers made affidavit averring that the Commissioner had been imposed upon and deceived by Leith's affidavit, which was false, and that he (Powers) had no knowledge of it, or chance to be heard, and applied to the Commissioner for an investigation, but was refused. He then applied to the Secretary of the Interior, who sustained the Commissioner's refusal, who thereupon cancelled Powers' declaratory statement. Leith then took full possession of the land and soon commuted, made final proof and payment, and received his patent. Meantime he filed a declaration of homestead under the State statute. Powers then made peremptory claim for the land, and on August 30, 1876, tendered to Leith the \$200, paid the United States for the land, and \$30 costs and expenses and fees, which Leith refused; whereupon Powers brings action in District Court, Goodwin, Judge, and demands judgment, declaring Leith trustee of the title, and a decree compelling him to give deed to plaintiff and costs of suit. The Court gave judgment for plaintiff, declaring Leith trustee of the title for the benefit of plaintiff, and directing him to make deed to him for the

land upon payment by plaintiff of \$230, and defendant to pay Court costs, \$64.25, and restore the premises. Motion by defendant for new trial was overruled, from which defendant appealed September 14, 1877. The judgment and order are now affirmed.

THE case of C. J. Zeinwaldt vs. the Sacramento City Railway Company, decided April 10th, was an appeal by the defendant from a judgment of the Sixth District Court of Sacramento county, in which *Messrs. Curtis & Clunie* were attorneys for appellant, and *Henry Starr* attorney for respondent. Zeinwaldt sued the railway company on five notes and an account amounting to \$3,363.90, given him by the company for work as gardener done by him during three years, in the "East Park," owned by the said railway company, in connection with their road. The company set up a denial, and that Zeinwaldt owed them for flowers sold at said Park and not paid for,—also urged limitation of their corporate powers in such a direction. The Court found for Zeinwaldt for full amount claimed—\$3,341.82 and costs \$29.75—and also denied motion for a new trial, from which the company appealed. This appeal has just been dismissed by the Supreme Court, with remittitur forthwith.

Circuit Court of the United States.

DISTRICT OF NEVADA.

THE EUREKA CONSOLIDATED MINING COMPANY

VS.

THE RICHMOND MINING COMPANY.

1. JURISDICTION AFTER BILL DISMISSED—INJUNCTION.—Where an injunction against working a mine pending a suit in equity has been dissolved by decree upon final hearing, the bill dismissed without qualification, the decree enrolled and an appeal taken in such form as to operate as a *supersedeas*, the Court rendering the decree has no jurisdiction, thereafter, to restrain the successful party from working the mine pending the appeal.
2. INJUNCTION—STATUTORY PROVISIONS.—Section 1182, Revised Statutes of Nevada, authorizing the Court to require the complainant to give security for injuries resulting to defendant from his acts pending the litigation, and in default thereof to dissolve any injunction in his favor, relates to cases still pending, not to cases already in judgment and closed.

SAWYER, Circuit Judge, HILLIER, District Judge, concurring.

The Eureka Consolidated Mining Company brought an action against the Richmond Mining Company to recover

possession of a portion of a silver mine. It also filed a bill on the equity side of the Court against the same defendant, alleging ownership of the portions of the mine sought to be recovered in the action at law; that defendant was in possession, working the mine and carrying away the ore; and praying an injunction pending the litigation, and that upon the hearing the injunction be made perpetual. A temporary injunction was issued. The defendant in these actions thereupon filed a cross-bill in the equity suit, alleging that the complainant in the original bill was, also, in possession of and working a portion of the mine in controversy, and praying an injunction which was also temporarily granted. The parties then waived a jury in the law case, and the law case was tried, and the bill and cross-bill in equity were heard at the same time during the March Term, 1877, upon the same evidence before Mr. Justice Field, Sawyer, Circuit Judge, and Hillyer, District Judge, the cases having been prepared and argued on both sides with consummate elaboration and ability. The Court found for the plaintiff in the law case, and gave judgment for the possession of the mine; and in the equity case a decree was entered for the complainant in the original bill, making the injunction perpetual, and a decree dismissing the cross-bill and dissolving the temporary injunction issued thereon and for costs. The decree of dismissal was absolute without any limitation or qualification. The case is reported in 4 Sawyer, 302, where the facts are fully stated.

Both parties had drifts running in various directions through the lode or different levels. The Richmond Company took an appeal in the equity case, sued out a writ of error in the action at law, and gave the bonds necessary to operate as a *supersedeas*.

After the appeal, the Eureka Company continued to work the mine, and extended its drift on one of its lower levels, so so as to cut the body of ore found in what is known as the Potts Chamber, as indicated in the report of the case in 4 Sawyer, at page 304—being the body of ore which the Richmond Company was working at the time of the institution of the actions; but did not enter or take possession of, or interfere with any of the Richmond Company's shafts, winzes, or drifts. Thereupon, at the March Term, 1878, of the Circuit Court, the Richmond Company, upon affidavits stating the appeal *supersedeas*, and the acts of the Eureka Company in working the mine in the disputed territory, applied for an order restraining the further working of the mine pending the appeal. It was claimed, on the argument, that the working of the mine, although not a technical, was a substantial violation of the *supersedeas*; and that the Court, for the purpose of pre-

serving the subject matter in dispute pending the litigation, should issue the order sought. Separate notices of the motion were given in the suit in equity and action at law. We will consider the equity case first. In this suit, upon the final hearing, the preliminary injunction was dissolved, and the cross-bill of the Richmond Company dismissed absolutely without limitation or qualification, the decree enrolled, and the term adjourned. An appeal to the Supreme Court was taken in proper time and form, to operate as a *supersedeas*; but there was nothing to supersede, except the decree for costs. The Court granted no affirmative relief on the cross-bill. It simply denied the relief asked by the Richmond Company, and dismissed the bill out of Court. The Eureka Company was not doing anything under or by virtue of the decree. It was not proceeding to collect the costs either by execution or otherwise. The case was ended in this Court, the jurisdiction exhausted, and the term adjourned. There was no longer any case pending in the Court in which any order could be made. The Court, therefore has no further jurisdiction in the case except to execute the decree for costs when the *supersedeas* is removed, if it should be removed, or till the decree is reversed on appeal to the Supreme Court, and the cause thereby reopened upon the receipt of the mandate from the Appellate Court. To issue a restraining order, would be to exercise a new original jurisdiction without any suit pending in which it could be issued. The cases of *Galloway vs. The Mayor, etc., of London*, 3 De Gex, Smith and Jones, 60, and *Coleman vs. The Hudson River Bridge Company*, 5 Blatch., 56, are in point. The former case was a bill to restrain the corporation of London from taking certain property under statutory powers. The Master of the Rolls dismissed the bill, and the order of dismissal was affirmed on appeal, the Lords Justices differing in opinion. An appeal having been taken to the House of Lords, it being probable that the corporation would take the property, and pull down the building pending the appeal, the appellant applied to the Lords Justices for an injunction to restrain the corporation from proceedings till the appeal could be heard. Although the Lords Justices expressed themselves as being as willing as they ought to be to grant the injunction, it was denied on the ground that their jurisdiction was gone on the dismissal of the bill. Lord Justice Turner said: "I cannot but think that by reason of the dismissal of the bill, the power of the Court is gone. I think that the plaintiff, if he intended to appeal to the House of Lords, ought, at the hearing, to have asked the Court so to frame its

order as to *keep alive its jurisdiction* pending the appeal." In *Coleman vs. Hudson River Bridge Company*, the Judges of the Circuit Court not agreeing, certified a division of opinion to the Supreme Court. The Justices of the Supreme Court were also equally divided in opinion on the questions certified. The consequence was a dismissal of the certificate of division by the Supreme Court. In the opinion dismissing the certificate the Court suggest that the bill must be dismissed, and that the complainant could then appeal from the decree dismissing the bill. The defendant filed the mandate and moved to dismiss the bill; whereupon, the complainant's counsel asked the Court to so modify the decree of dismissal, as to retain the provisional injunction until the decision of the Supreme Court on appeal from the decree of dismissal. It was argued that the injunction did not necessarily fall with a dismissal of the bill; or, if it did, *prima facie*, that it was in the power of the Court to continue the injunction till the decision of the appeal. Mr. Justice Nelson, in delivering the opinion of the Court, says: "The Court cannot agree with either of these positions. The legal result of the division of opinion of the Judges is a dismissal of the bill *without any qualification*. Indeed, the condition of the Court renders any qualification or modification of the dismissal impracticable. The case *is out of Court*, so far as it respects *any proceedings*, except an appeal to review the decree. The Judges are disabled, from a contrariety of opinion, to annex any condition, and *it certainly requires no argument to show that in case of an unqualified dismissal of a bill, all incidents fall with it*. We agree that the Chancellor may, in his discretion, direct a modified dismissal, and thereby annex to it such conditions as may seem to him just and equitable. Having the possession and entire control of the cause, this qualified exercise of power is practicable. But such a case is very different from this one, where the dismissal is the result of law, and absolute; and where from the condition of the Court no modification can be annexed. It was insisted that an appeal, when taken within the time and in the mode prescribed by the Acts of Congress of September, 24, 1789 (1 U. S. Stat. at Large, 85, § 23), and March 3, 1803 (2 Id., 244, § 2), will operate under and by virtue of these Acts to continue the injunction. But it is quite clear that these provisions deal only with the writ of execution founded upon the decree rendered, and which is awarded by it, and have no application to the provisional writ of injunction, or other incidental proceedings in the progress of the cause." (5 Blatch. 58).

This case is clearly an authority directly upon the point, that when a bill is dismissed without qualification, it is out of Court; that all incidents go with it, and the jurisdiction is gone. The very object of the motion was to obtain a modification of the dismissal so as to avoid this result. Mr. Justice Nelson also observes that the point was a subject of consideration in the Supreme Court, and that no doubt was entertained of it by any of the Judges. It may, therefore, be regarded as the decision of the Supreme Court, and as settling the question. The conclusion is so obvious that the counsel in the last case, in their motion, proceeded upon the theory, that unless they could procure a modified decree to preserve the jurisdiction, the jurisdiction would be gone. The two cases cited are the only ones brought to our notice, or that we have been able to find, directly deciding the point. Occasions for continuing injunctions pending an appeal must have been frequent and pressing; and the fact that no instance can be found in practice of their continuance where the bill has been dismissed absolutely, is the best evidence that Court and bar have regarded the jurisdiction as gone.

Counsel for the Richmond Company relied upon two cases, *Goddard vs. Ordway*, 4 Otto, 672, and *Hart vs. The Mayor of Albany*, 3 Paige, 381, neither of which touches the point in this case. In the former case, there was a receiver; and at the time the *supersedeas* was perfected, the receiver had \$25,000 of the funds in his hands, which required an order of the Court to enable him to pay it over to the defendant in pursuance of the decree; which order the Court was asked to make. The Supreme Court say: "Such an order would be in *aid of the execution of the decree*, which has been stayed, and consequently beyond the power of the Court to make until the appeal is disposed of. While the Court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would defeat its jurisdiction." There the fund was in Court, in its custody and control. But in this case, there is nothing to stay except the collection of costs. The Court has no custody of the subject-matter. There is no fund in Court or under its control. In the case cited from Paige, the master out of Court, upon an *ex parte* application, had granted a preliminary injunction restraining the defendant from destroying and removing his building. Upon the coming in of the answer, the defendant moved, on bill and answer, to dissolve the preliminary injunction, which motion was granted. An appeal was taken from

the order dissolving the injunction. There was no dismissal of the bill; no final decree in the case. The appeal was from the *interlocutory order*. The case still remained in the Court, and the Chancellor had full authority to make any other order that the exigencies of the case demanded. In this condition of things, upon application, and upon terms, he made a new order restraining for a brief time the destruction of the property in controversy. He did not continue the former injunction, but, as he says in terms, exercised a new and original jurisdiction in making the new order. That is not this case. Here the bill is dismissed absolutely, and the case is wholly out of Court. There is no suit pending in which any order can be made. It follows that the motion in the suit in equity must be denied.

In the action at law, this Court never had jurisdiction to issue an injunction. And it was for this reason that the bill in equity was filed. The Court never had the custody of the subject matter. The *supersedeas* undoubtedly stays the issue of a writ of restitution and execution for costs. But none has been issued or asked for. The Eureka Company are doing nothing whatever by authority, or under, or in pursuance of the judgment, or any process issued thereon. It is doing nothing more than it was doing before these actions were commenced, except that it has extended its drifts further into the mine, so as to work the body of ore which it was seeking by these same means to obtain, prior to the institution of any of these suits. It is simply doing what it was restrained from doing by the injunction issued on the cross-bill while it was in force. It is proceeding under the same claim and authority now, as it was before—nothing more, nothing less. The Court has made no order in this case other than to enter judgment for the possession and costs in favor of the Eureka Company, and it can make none. Undoubtedly, if the Court had inadvertently, or otherwise, issued an execution after the perfection of the *supersedeas*, and the plaintiff had been thus wrongfully put in possession, or was about to be so put in possession under the writ, it could by virtue of its control over its process have stayed the execution of the writ, or have restored the possession improperly given had the writ been executed. But nothing of the kind has occurred. Nothing in the custody or control of the Court in this action is in any manner affected by the acts of the Eureka Company, and the Court is without power to interfere. If there is any power to issue the restraining order asked, it lies with the Appellate Court. Whether that tribunal can make the order must be deter-

mined by itself. Under its rules, however, upon a proper showing it can afford a speedy remedy by advancing the cause and bringing it to an early hearing. If deemed a proper case this would perhaps be the better remedy. While on the one hand, the working of the mine might consume the subject matter of litigation, and leave little for the Richmond Company in case of ultimate success; on the other, to restrain the working of the mine adjudged to belong to the Eureka Company for the period of three years—the time suggested as likely to be required for the disposition of the case—would be scarcely less calamitous should the decision be affirmed. To those familiar with the subject, it requires no argument to show that it would be extremely disastrous to allow an open mine with all its vast extent of shafts, drifts, winzes, etc., to fill with water, fall in, and become destroyed, and its machinery, hoisting works, mills and mine itself, to be disused for so long a period. Section 1182 of the Statutes of Nevada, also relied on by the Richmond Company, relates to proceedings in a case pending over which the Court still has control. But this case is ended and gone beyond the reach of this Court. The statutory provision, therefore, has no application.

It follows, that the motion must be denied, and the order issued restraining the Eureka Company from working pending the motion vacated and dissolved, and it is so ordered.

March 22, 1878.

J. J. Williams and Crittenden Thornton for motion.

S. Heydenfeldt, John Garber, and H. I. Thornton, contra.

Recent U. S. Land Decisions.

RECENT CALIFORNIA CASES.

WASHINGTON, April 6, 1878.—In the matter of the application of Larce & Johnson, attorneys for the heirs of David Foster, for a modification of the Secretary's decision of August 7, 1877, relative to lands near Los Angeles, upon the ground that the selection of State lands was not carried out in accordance with the provisions of the State law, and that the application of the State purchaser was informal, the Secretary rules that the Government can take no cognizance of the transactions of the State with a purchaser. The Government can only concern itself with the answer to these questions: First—The right of the State to claim the land. Second—Was the land open to selection?

The Secretary, on appeal, has affirmed the decision of the Commissioner in the case of Ethan Allen and J. L. Plummer vs. the Southern Pacific Railroad Company, rejecting the claims of Allen & Co. and recognizing Plummer's application to file declaratory statement for the land in question near Los Angeles.

The Secretary, on appeal, has affirmed the decision of the Commissioner in the case of H. A. Bowrie vs. the heirs of Simon D. Webb, refusing to cancel Webb's homestead entry on certain lands near Marysville. The decision is based on the fact that at the time of the original hearing the Department did not require residence by the heirs as well as cultivation.

MUNICIPAL COURT OF APPEALS.—The Governor has appointed as Judge of this new Court, the creation of which by the last Legislature, fills an important want in the judicature of this city, Hon. T. W. Freelon, a learned lawyer, and one fully competent to fill this position. This gentleman brings into the office the experience of many years' connection with the Bench and Bar, having filled the important position of County Judge in the early history of this city,—and having also been connected for a long series of years with ex-District Attorney H. H. Byrne, in the discharge of the arduous duties of that office.

SUNDAY LAW IN MASSACHUSETTS.—In the case of the Commonwealth vs. Has, in the recently published Supreme Court Reports of Massachusetts, it was decided that, although one who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business on that day, may safely perform any other secular business, travel or labor on the Lord's day, this privilege does not extend to keeping his shop open.

JUDGE OF THE SECOND JUDICIAL DISTRICT.—Hon. P. O. Hundley has been appointed by the Governor, Judge of the Second Judicial District, to fill the vacancy occasioned by the death of Judge Sexton. Having occupied this position before to the satisfaction of the profession and people of the District, this appointment is eminently fit to be made.

CALIFORNIA LEGAL RECORD.

VOL. I.

APRIL 20, 1878.

No. 4

Legal Notes.

LOOK OUT FOR DEFECTIVE BLANKS.—The demurrer to the complaint of Bertha B. Block against Sheriff Nunan was sustained in the Fifteenth District Court one day last week. The action was to recover personal property seized by the Sheriff. Judge Dwinelle remarked that the lawyer had been misled by one of the miserably-drawn blanks sold by stationers. The complaint does not say that the goods were wrongfully seized, or that any demand had been made for their return, or that they were in the possession of the defendant when a demand was made. This is like a majority of the printed blanks.

IN the case of Hagar vs. Spect, decided March 21st, and published in the LEGAL RECORD, No. 1, a petition for rehearing has been filed upon motion of Belcher for respondent, and a stay of proceedings granted until same is determined.

IN the case of Zeinwaldt vs. the Sacramento City Railway Company, reported in the RECORD of last week, it is now ordered that the remittitur be stayed, and we suppose the company intend making one more effort before consenting to the payment of the gardener's claim.

IN Billings vs. Drew, published in the RECORD of last week, a stay of proceedings has been granted, upon motion of Armstrong, for respondent, and filing of petition for rehearing.

REHEARING has been granted in the case of DeCels vs. Maclay, et al.; also in the case of People vs. Jones; Orena

vs. Dewlany ; Shaw vs. Wadsworth; and in City of Stockton vs. Reid, as the counsel who tried it in the Court below and prepared the points here, was prevented by sickness from arguing the case.

A BIG DAY'S WORK.—Twenty-five decided cases have just been filed by the Supreme Court, in one day—April 19th—too late for report in this issue.

ADMITTED TO PRACTICE.—Wm. H. Allen was admitted to practice by the Supreme Court on April 9th, upon a license from the Court of Appeals from Kentucky ; and, on April 15th, Wm. Dorsey Carlile, on motion of Hon. Creed Haymond, and a license from the Supreme Court of Illinois.

SECRETARY OF SUPREME COURT.—Mr. Carl C. Finkler has resigned the office of Secretary and Librarian of the Supreme Court of this State, which he has filled for some eleven years,—and Mr. T. F. O'Connor, the genial and capable Baliff, has received the appointment.

JUDGE FREELON, announces that he expects to occupy the present Probate Court-room for the Municipal Court of Appeals by the 20th of May, when the calendar will be called and the remainder of the vacation will be devoted to the disposal of cases in which parties are ready on both sides. No cases will be disposed of *ex parte* or by default of appearance during vacation.

WE had all ready for publication in this issue—an exhaustive statement of the celebrated "Cunningham Will Case,"—prepared by Robert Ash, Esq.—one of the attorneys in the case—but which, we regret to say, was crowded out at the last moment, by the press of Supreme Court Opinions—which always have precedence.

Supreme Court of California.

[April Term, 1878.]

[No. 10,342.]

[Filed April 11, 1878.]

THE PEOPLE vs. MCKELLER.

On appeal from San Joaquin County Court—W. S. BUCKLEY, Judge.

TESTIMONY—CROSS-EXAMINATION.—The direct testimony of a witness must not be discredited by contradictory evidence on a collateral or irrelevant issue. He cannot be cross-examined as to collateral facts, for the purpose of contradicting or impeaching his testimony-in-chief. [See 1st Greenleaf Ex., § 449.]

STATEMENT OF FACTS.

On May 25, 1877, the defendant was indicted jointly with James Hopkins, Frank Jones, Chas. Jefferson, and Frank Moore, by the Grand Jury of San Joaquin county, at Stockton, for burglary of a railroad car on the night of Saturday, April 21st, while running between Lathrop and Stockton, between 3 o'clock and 3:50 A. M. of Sunday, April 22d. The articles taken were a case of cigars and a case of shoes. Upon trial, some of the evidence was in confession by some of the prisoners, and somewhat contradictory. One witness, Carolan, testified to seeing the defendant on the corner of Third and Mission streets, San Francisco, on the same Sunday between 3 and 4 P. M. The prosecution sought to throw discredit upon this by cross-examination and comparison of his statements as to residence. Defendant found guilty and sentenced to three and one-half years in State Prison. Motion for new trial denied, and appeal taken.

District Attorney J. A. Hosmer, assisted by W. L. Dudley, for People.

S. L. Terry, Esq., attorney for defendant.

OPINION BY THE COURT.

The prisoner, in order to prove that he was not present in San Joaquin county at the commission of the burglary for which the indictment proceeds, produced a witness, Richard Carolan, who testified in substance that he had seen the prisoner at the corner of Third and Mission streets, in the city of San Francisco, on Sunday, April 22, 1877, between 3 o'clock and 4 o'clock P. M. It was conceded at the trial, that if the prisoner was present in San Francisco at the time mentioned by the witness Carolan, it was impossible for him to have been present at the scene of the burglary. The witness Carolan, upon his cross-examination by the counsel for the People, stated that he had lived in the city of San Francisco ever since

1855, except that he had been out of the city for the space of two years, working on a ranch in Marin county. He also stated that he had testified in this cause as a witness for the prisoner at a former trial. He was then asked by the counsel for the People if he did not testify at the former trial that he had lived in Marin county *four* years, or that he had been in that county *six* or *seven* years since the year 1855, and answered that he had not so testified. In their case in rebuttal the People, in order to contradict the witness upon this point, were permitted by the Court, against the objections of the prisoner to read to the jury a portion of the evidence given by the witness at a former trial, and by which it was made to appear that he had, in point of fact, testified as claimed by the counsel for the prosecution, and had stated at the former trial that he had been absent from San Francisco, and in Marin county some six or seven years since 1855.

In permitting the prosecution to contradict the witness on this point the Court below erred.

The witness had testified in chief, that he had met the prisoner in San Francisco in the month of April, 1877. When, on his cross-examination, and in answer to questions put by the prosecution, he testified that he had first gone to live in San Francisco some twenty-two years before, and that since the year 1855 he had been in the county of Marin only two years, he testified to matters merely collateral in their character, and under the well settled rules concerning the production of evidence the prosecution were bound by his answers.

"But it is a well settled rule," says Mr. Greenleaf, "that a witness *cannot be cross-examined as to a fact which is collateral and irrelevant to the issue merely* for the purpose of *contradicting him* by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question; but is conclusive against him." (1 Greenleaf Er., § 449.)

Judgment and order denying a new trial reversed and cause remanded for a new trial.

[No. 10,331.]

[Filed April 11, 1878.]

THE PEOPLE vs. MORINE.

On appeal from Tenth District Court, Colusa county, PHIL.
W. KEYSER, Judge.

TESTIMONY.—In a criminal case, the jury must be satisfied beyond a reasonable doubt that every fact essential to constitute the offense charged has been proved.

STATEMENT OF FACTS.

Antoine Morine was indicted by the Grand Jury of Colusa County, on July 16th, 1877, for the murder of F. L. Gardiner, committed May 6th, 1877, in a saloon in Butte City, Colusa Co., with a knife, on Sunday evening, and Gardiner died on the following Tuesday. There were three eye witnesses besides the defendant. Morine was convicted, on trial, of murder in the first degree, and sentenced to imprisonment for life. His counsel took many exceptions to the rulings of the Court, as to admission of evidence objected to, and testimony prepared by the Defendant, and refused. Motion was made for new trial, and overruled. Appeal then taken on questions of law and fact, among them certain instructions asked by Defendant and refused by the Court, to this effect: "Jury must be entirely satisfied beyond a reasonable doubt that Gardiner died from the effect of wounds inflicted by defendant, and did not die from any other cause," or must acquit;—and three others of like bearing, the refusal of which, the Judge avers, was for want of conformity to the law, and the difficulty of correcting them amid the distractions of the trial, and proper examination of points, etc.

Jackson Hatch, District Attorney, for people.

A. L. Hart, attorney for defendant and appellant.

OPINION BY THE COURT.

The Court below erred in refusing the instruction asked by defendant's counsel: "Before the jury can convict defendant, they must be entirely satisfied, and beyond a reasonable doubt, that deceased, Gardiner, died from the effect of wounds inflicted by defendant, and did not die from any other cause."

In a criminal case the jury must be satisfied beyond a reasonable doubt, that every fact essential to constitute the offense charged has been proved.

Judgment and order reversed and cause remanded for a new trial.

[No. 10,324.]

[Filed April 11, 1878.]

THE PEOPLE vs. METHVIN.

On appeal from Colusa County Court, F. L. HATCH, Judge.

IMPEACHMENT—PERSONAL KNOWLEDGE.—Evidence tending to impeachment of a witness must not be based on *personal knowledge* as distinguished from general reputation.

STATEMENT OF FACTS.

J. D. Methvin and R. B. Methvin were indicted for grand larceny on July 31, 1877, by the Grand Jury of Colusa county, and tried by jury at October term of 1877 and found guilty, with recommendation to the mercy of the Court. The larceny was thirty-three sacks of wheat, value \$100, from one J.

M. Clark and the case rested on circumstantial evidence. Motion of defendant for a new trial, and assignment of many errors, which was overruled and sentence of three years in State Prison. On the trial the question was asked of J. M. Clark—among many others—"If from general reputation *and from his own knowledge* he would believe the defendant under oath in a matter where he was interested?" which was objected to, but on which point the appeal now turns. A large mass of testimony was taken.

Jackson Hatch, District Attorney, for People.

T. J. & A. L. Hart, attorneys for defendant.

OPINION BY THE COURT.

The Court below erred in permitting the question (against the objection of defendant's counsel), "From what you know of his reputation and *what you know of him*" (the witness sought to be impeached) "would you believe him under oath in a matter in which he is interested?"

Assuming that the question was in other respects proper, it is clear that, in so far as it authorized the witness under examination to base belief on his personal knowledge—as distinguished from general reputation—the question was improper.

Judgment and order reversed and cause remanded for a new trial.

[No. 10,340.]

[Filed April 11, 1878.]

THE PEOPLE vs. MAGGIE BROWN.

On appeal from Sacramento County Court, CLARK, Judge.

TESTIMONY—IN CRIMINAL CASES.—The failure of a defendant in a criminal case, to become a witness, is not to be considered by a jury as a circumstance tending to prove guilt. (Penal Code, sec. 1323; *People vs. Tyler*, 36 Cal., 522.)

STATEMENT OF FACTS.

Defendant was indicted in March, 1877, by the Grand Jury of Sacramento county for grand larceny of \$50 money, silver watch \$15, and a vest \$10—in all \$75, on Ira Beardaley. Beardaley drank beer in a saloon from hand of defendant, and became stupified and helpless, and then claims to have been robbed and beaten. Trial by jury, Judge A. C. BROWN, of Amador county, acting at request of Judge CLARK,—found guilty and sentenced to prison for two years. Motion for a new trial overruled, appeal taken—on questions of law—among them the following: In argument to the jury the District Attorney used this language: "The defendant had it in her power to disprove her connection with the larceny by being a witness in her own behalf;" to which defendant's counsel objected, but Court overruled, and ordered defendant's counsel to take his seat, &c.

Chas. T. Jones, District Attorney, for People.

I. S. Brown and J. C. Goods, attorneys for defendant.

OPINION BY THE COURT.

The Court erred in permitting the District Attorney (against the objection of defendant's counsel) to argue that the failure of defendant to become a witness was to be considered by the jury as a circumstance tending to prove her guilt, and in approving of such action of the prosecuting officer. (Penal Code, section 1,323; *People vs. Tyler*, 36 Cal., 522.)

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5845.]

[Filed April 15, 1878.]

THE DELPHI SCHOOL DISTRICT vs. MURRAY.

Appealed from the Fifth District Court, San Joaquin county.
S. A. BOOKER, Judge.

SCHOOL DISTRICT TRUSTEES.—If proved that persons are "*acting as trustees*" of a school district, a presumption thereby arises that they are officers *de jure*,—though the presumption is disputable by other evidence.

PRESUMPTION OF OFFICIAL CHARACTER.—If not so disproved, the presumption will stand for proof that they are *de jure* trustees:—"upon the strong presumption arising from the undisturbed exercise of a public office, that the appointment of it is valid," etc. (Greenleaf, vol. 1, §. §. 91-2.)

STATEMENT OF FACTS.

The Delphi School District, by its three trustees, organized and existing since August, 1861, and not owning land for a school site, desires to acquire that heretofore occupied, by condemnation—owned by Murray and wife,—ask the Court for an order adjudging the value and security proper, &c. The defendant denies the organization, and election of the trustees, claims it an unsuitable site, too near his house, an annoyance, &c. Also a mortgage and a homestead declaration on the said land. Offers an acre in either of two other places on his land, and also others offer sites for same. Tried by Court, without jury, and found that the spot was central and suitable, that the acre was worth \$70; damages \$50—but that no tender had been made by trustees, though they had \$2,000 in hand that was applicable, but that they were not *de jure* trustees. Conclusion of law that plaintiff take nothing, and defendant, Wm. Murray, have his costs, as expended, \$29.35. Plaintiff appeals September 10, 1877. Many points are made and authority cited on the appeal, on both sides.

Jan. A. Louttit, attorney for petitioner and appellant.

Terry, McKinne & Terry, for defendants and respondents.

OPINION BY THE COURT.

1. The proceedings in this case amount to an action brought by Grupe and others, asserting themselves to be trustees for the *Delphi School District*, who sue in the name of the District, because authorized by the statute to do so. (Pol. Code, §1575.)

2. It is alleged in the complaint that Grupe and the others "are the duly elected, qualified and acting trustees in and for said District;" and this allegation having been denied in the answer, it became the duty of the Court below, sitting without a jury, to find the fact in that respect. This was not done; but instead a finding, so-called, was made in the following words: "That C. Grupe, N. E. Alling and R. P. Nason were acting as trustees for said school district, but there was no sufficient evidence of the election of C. Grupe, R. P. Nason and N. E. Alling or either of them as trustees of the Delphi School District, of the county of San Joaquin, State of California; therefore the Court finds that they were not *de jure* trustees, and neither of them was a trustee *de jure* of said school district at the time of the commencement of this action."

To find that these persons were "*acting as trustees*" was merely to embody the evidence or a portion of it adduced at the trial upon the issues just referred to, and to add that "*there was no sufficient evidence of the election of Grupe*," etc., was merely to remark upon the condition of the case as presented. If it was proven at the trial that Grupe and others were "*acting as trustees*," a presumption thereby arose that these persons were officers *de jure*, but this presumption was, of course, disputable in its character, and might have been met and overcome by other evidence. (Code Civ. Pro., §1963. Subdv. 14.) If not so met and overcome the presumption would stand for proof and would support a finding that these persons were *de jure* trustees.

This was the rule at common law, and the statute had wrought no material change in that respect. That direct and primary proof of title to the office is dispensed with in such cases is mentioned by Mr. Greenleaf, as constituting an exception to the general rule excluding secondary evidence, and as proceeding upon "the strong presumption arising from the undisturbed exercise of a public office, that the appointment of it is valid," etc. (Vol. 1, §§ 91-2.)

Judgment reversed, and cause remanded.

[No. 5937.]

[Filed April 15, 1878.]

WEILL vs. JONES.

Appeal from Seventeenth District Court, Los Angeles County.
SEPULVEDA, Judge.

RECISION—SPECIFIC PERFORMANCE.—Effect of recision would be to restore the *status quo*;—the one party becoming entitled to a restoration of the premises;—the other, to a restoration of the monies paid.

A stipulation inserted that the party of the first part shall retain the monies paid, entitles the party of the second part to a right to specific performance, that might continue after the expiration of the period named,—no inexcusable delay occurring.

STATEMENT OF FACTS.

On February 17, 1875, Alex. Weill entered into an agreement to sell Norman C. Jones certain lands of the Azusa de Duarte Rancho, in Los Angeles county, for \$70,000, on which Jones paid \$30,000 down, and gave two notes for \$17,500 each—one payable in two years, and one in three years—and note for the balance, \$5,000, in one year, with interest at ten per cent per annum. A grace or stay of 90 days was allowed on these notes, and Jones took possession of the premises.

At the same time Jones gave a mortgage on the land for \$20,000 to Temple & Workman for one year, and interest at $1\frac{1}{2}$ per cent per month, and on June 19, 1875, another mortgage to same for \$5,000 for one year and same rate of interest.

On the \$5,000 note, due February 17, 1876, \$300 was paid and no more—leaving due \$4,700 and interest. The other two notes were never paid. Meantime Temple & Workman assigned the two mortgages to Milton S. Latham to secure moneys due him. Then Temple & Workman assigned certain property to Daniel Freeman and E. E. Spence, including these two mortgages, for the benefit of their creditors.

On October 7, 1875, Jones leased a part of said lands to E. W. Galé, P. H. Gale, Alexander C. Gale and Geo. K. Gale, to January 1, 1877.

(Another similar agreement had been made on February 1, 1875, for certain other property, and \$625 paid, and which land was included in the above named mortgages to Temple & Workman.

The plaintiff now demands judgment that, in case the sums of \$5,325, principal, and \$4,157.50, interest, be not paid, the premises be restored, and previous payments forfeited. The defendant, Latham, as holder of mortgage from Temple & Workman, brings a cross-complaint and makes defense by his attorneys, *Winans & Belknap*, July 3d, 1876, and avers that the full time had not elapsed for payment so recision could be had.

Jones, in defense, alleges false representations in regard to water and irrigation advantages on said lands, on the part of one Meyer, agent for Weill. Freeman & Spence, as assignees for creditors, claim a return of the money paid by Jones to Weill before any recision of the premises.

Jones, in a cross-complaint, with many allegations, demands judgment

1. That the notes be declared fraudulent and void, and be delivered up to him.
 2. That he recover the money paid, and interest—and 3. Damages, \$40,000.—and costs of action. Court gave judgment for plaintiff Weill, on January, 6th, 1877, and entered decree of foreclosure February, 28th, 1877, and costs of action, \$166.20. From which Freeman and Spence, and Jones appeal September, 11th, 1877, and urge that the action was premature—the 90 days grace not having expired;—That judgment should have been for rescission and not foreclosure,—i.e. the restoring of the money and land.

Latimer, Morrow & Proffatt, and *Brunson, Eastman & Graves*, attorneys for appellants Freeman and Spence;—*Smith & Stephens*, for appellant Jones;—*John Mansfield*, for defendants Gales;—*Winans & Belknap*, for defendant Latham.

Glassell, Chapman & Smiths, attorneys for respondent.

OPINION BY THE COURT.

The decision of this case depends upon the construction of a portion of one of the agreements annexed to the complaint, which reads as follows :

"If default shall be made in any of the above payments
 * * * for the space of 90 days after the same shall become due, then it shall be lawful for the party of the first part
 * * * at his option and discretion, at once to *rescind this agreement* to convey, and to re-enter upon and re-possess said premises * * * and in such case all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part."

The effect of a *rescission* would have been to restore the *status quo*; the party of the first part would have been entitled to the possession of the premises, the party of the second part to a restoration of the moneys he had paid.

It is apparent that the words "to rescind" are not employed in their usual or proper sense, because they are followed by a statement that the party of the first part shall *retain* the moneys paid. In its legal effect the stipulation is for the benefit of the party of the second part. If the stipulation were not in the agreement, the plaintiff would succeed to the right to re-enter immediately on the failure of the second party to make a payment—subject, of course, to the right of the party of the second part to a specific performance, no inexcusable delay occurring. This right to specific performance might continue after the expiration of the period named, the only effect of the stipulation in respect to that matter being that it constituted an agreement that *time should not be considered of the essence* of the contract during the 90 days.

A provision that a party may at the end of 90 days after an event employ powers, which, except for the provision he could employ immediately on the happening of the event, means nothing, unless it means that he *shall not* employ them during the 90 days.

The present action was commenced less than 90 days after the default of defendant Jones. The plaintiff had obtained a decree restoring him to the possession of the land, and forfeiting to him the payments already made by the said defendant. Both these are consequences which the agreement provides shall *only* follow a failure to pay for 90 days after a payment shall become due.

Judgment reversed.

[No. 5992.]

[Filed April 15, 1878.]

CROGHAN vs. MINOR & SPENCE.

Appeal from Eight District Court, Humboldt county.

FORECLOSURE OF MORTGAGE—WHO ARE PARTIES.—All parties who are beneficially interested, either in the estate mortgaged, or the demand secured, are proper parties to the suit.

But those claiming either legal or equitable estate *adversely* to that of the mortgagor are *not* proper parties, as they have no interest in the subject matter of the action.

STATEMENT OF FACTS.

On May 1st, 1876, D. W. Minor gave a promissory note to the plaintiff Croghan, for \$1,280. for six months, secured by a mortgage on 160 acres of land, being the N. W. $\frac{1}{4}$ of sec. 18, Tp. 6, N. of R. 2 E. The survey plat of the land, (including this land) had been filed October 22d, 1874, and Minor filed his claim on October 23d, 1874, (the next day,) alleging settlement on March 20th, 1874, and he proved up and entered on June 23d, 1875, receiving his patent January 5th, 1876. But Richard Spence claimed a pre-emption, commenced on the W. $\frac{1}{4}$ of said N. W. $\frac{1}{4}$ of land, (80 acres)—one half of the mortgaged premises,—and *actual possession* as having been taken April 1st, 1872, and filed December 3d, 1874, less than two months after the filing of the survey, though a little later than that of Minor. On January 14th, 1877, instructions came from the Land Office for the Register and Receiver, to order a hearing between the two parties, and Minor's patent to be retained till decided. This was done, and the claim of Spence found to be a prior one, and the Land Com'r decides Minor's entry to be a fraudulent one, and revokes his patent. Hence, upon trial of the cause, Spence asks to be dismissed from the case, and *his* land not be held subject to mortgage of plaintiff. But the Court decides that the plaintiff is entitled to relief, and that Spence's claim is subordinate to the mortgage, and gives judgment against Minor for \$1,650, and interest, and a decree of foreclosure and sale of the whole land, on October 18th, 1877. From

this Spence appeals, November 15th, 1877, and claims that Minor was not in *actual possession*, but only holding patent by fraud, and hence, it was void, and cites many authorities. Also, that if patent was obtained by inadvertance or mistake, the *really* never passed from the United States to Minor, and that as he, Spence, was in actual possession of the land (his share,) the plaintiff, in taking his mortgage, was bound to take notice of his rights as *prima facie* evidence of seizure in fee simple.

Chamberlin & DeHaven, attorneys for plaintiff and respondent,

Walter F. Jones, attorney for Spence.

OPINION BY THE COURT.

There is in the record no finding of the fact alleged in the complaint, but denied in the answer, that defendant Spence "has, or claims to have, some interest in, or claim upon said premises, or some part thereof; as purchaser, mortgagee, judgment creditor, pre-emption or homestead claimant, otherwise, *which interest or claims are subsequent to and subject to the lien of the plaintiff's mortgage.*"

On the contrary the Court finds facts showing that the asserted claim of defendant Spence is not subject to the lien of plaintiff's mortgage, and that the alleged interest of said defendant is not derived from, nor connected with the estate mortgaged, but is hostile to the claim of the mortgagor.

The object of a suit to foreclose a mortgage is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand for the security of which the mortgage was given.

All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit. (*Burton vs. Lies*, 21 Cal., 87; *San Francisco vs. Lawton*, 18 Cal., 465.)

This rule will ordinarily embrace a mortgagor and mortgagee, and those who have acquired rights or interests under them, although prior incumbrancers may be made parties for the purpose of liquidating their demands.

It is manifest that those claiming either legal or equitable estate adversely to that of the mortgagor are not proper parties to such a proceeding, as they have no interest in the subject matter of the action.

On the finding in respect to the claim or interest of defendant Spence, the Court should have dismissed the bill as to him.

Judgment reversed and cause remanded, with direction to the District Court to enter a decree against defendant Minor, in accordance with the prayer of the complaint, and to dismiss the action as to the other defendant.

[No. 5299.]

[Filed April 15, 1878.]

GREEN vs. CAMPBELL.

This case was reported in RECORD No. 3,—with the facts in issue;—and judgment of the lower court reversed. This opinion is given on a motion for rehearing.

OPINION BY THE COURT.

The judgment was reversed here, because a demurrer interposed to the special defense had been sustained by the Court below. The respondent, in the petition for a re-hearing, now claims that this action of the Court below was not of any moment, because the matter set up in the special defense might have been proved under the general issue pleaded in the answer.

It is not worth while, however, to consider this proposition now, because, even if the view of the respondent be correct, it appears by the record that the defendant offered at the trial, under the general issue pleaded to prove the several matters set up in the special defense, but the evidence was excluded upon objection of the respondent.

Re-hearing denied.

[No. 3857.]

[Final decision, March 27, 1878.]

BUGBEY vs. NATOMA WATER & MINING CO.

Action commenced in 11th District Court, El Dorado Co.

STATEMENT OF THE CASE.

Bugbey, the plaintiff, makes complaint that on October, 17th, 1866, he owned (having bought from the State of California, as to sec. 16,) the S. $\frac{1}{4}$ of sec. 16, and the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, of sec. 21, both in Township 10, N. of Range 8, E.—M. D., and that on December, 1st, 1866, the defendant, Natoma Ditch and Water Co., entered upon, and took possession of, a strip of ten feet wide across both described pieces of land, as the Natoma Ditch;—and claims damages, \$240. and monthly rent and profits, \$10. and asks \$500 damages, etc., in which *R. & E. J. Robinson* were his attorneys. The Company demurred by *C. G. W. French*, their attorney. Then occurred a substitution of attorneys:—*Geo. E. Williams & G. J. Carpenter*, for plaintiff, and *Geo. G. Blanchard*, for defendants,—and twenty days for amended complaint, to which complaint defendant again demurred, but was overruled. Claimed in further defense that the canal was located in 1851, and under a grant of Congress, etc.

Other proceedings followed, till, in February 1873, the Court, A. C. ADA :

Judge—found that the said canal was completed April 1st, 1873,—was twenty-five miles long, and with several branches,—had cost about \$400,000,—had been in possession of defendants for over fifteen years, and a vested right acquired,—and had become a necessity as the only source of supply of water for seventeen sections of land, and 3,000 people. Held, that the title of the said land had passed to the State of California, from the United States, by act of March 3d, 1853, and became confirmed and absolute by the approval of the survey, on May 19th, 1866. That Congress could not afterward impair or limit the title, hence, could confer no title on defendant, in July 1876, by act or otherwise, and could not attack plaintiff's title from the State in any way.

Adjudged that plaintiff is entitled to recover possession, and \$59 as monthly rents and profits, and his costs, \$106.50,—all as to sec. 16, but not as to sec. 21,—given April 4th, 1873. To this, defendants take exception, and make many points, and with numerous affidavits—of H. G. Livermore, President, and others—move for a new trial and are overruled. Appeal is then taken on all points to the Supreme Court of California, May 19th, 1873. On April 30th, 1875, the Supreme Court affirmed the judgment. Defendant then petitions for writ of error to the Supreme Court of the United States, on the ground of a claim under two acts of Congress, one of July 26th, 1866, and one of March 3d, 1853. Writ granted, and on January 7, 1878, the United State Supreme Court affirmed the judgment, and delivered the following elaborate opinion:

[No. 132.]

[October Term, U. S. Supreme Court.]

THE NATOMA WATER AND MINING COMPANY,

Plaintiff in Error, vs.,

B. N. BUGBEY.

[In Error to the Supreme Court of California.]

Mr. Chief Justice WAITE delivered the opinion of the Court.

This was an action of ejectment brought by Bugbey, the defendant in error, against the Natoma Water and Mining Company, plaintiff in error, to recover possession of a part of the south half of section 16, township 10, north of range 8 east, Mount Diablo base and meridian, in the State of California. Bugbey claimed title by grant from the State, and the company under the Act of Congress of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," (10 Stat., 244,) and the Act of July 29, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes." (14 Stat., 251.)

The decision of the Supreme Court of California having been against the title set up by the Company, this writ of error was brought. The facts affecting the federal question in the case are as follows:

In 1851 the company commenced the construction of a canal upon the unoccupied and unsurveyed public lands of the United States for the purpose of supplying water to miners and others. This canal was completed at large expense in April, 1853, and the premises in controversy are included within its limits. By the Act of March 3, 1853, (10 Stat., 244,) Congress provided for the survey of the public lands of California, and granted sections 16 and 36 to the State for school purposes. By section 7 of this Act it was provided, "that where any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made on the sixteenth and thirty-sixth sections, before the same shall be surveyed, * * * other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress, approved May 20, 1826. * * *"—(4 Stat., 179.)

The survey of the lands in controversy was completed May 19, 1866, and the plats deposited in the United States Land Office for the district June 16, 1866. At that time Bugbey was an actual settler upon the legal subdivision of the section sixteen in which the premises are situated, and had thereon a dwelling-house and agricultural and other improvements. He made no claim under the pre-emption laws of the United States. Other persons were also in possession of other portions of the section. The Act of 1853 required (sec. 6) that "where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of the surveys to the land offices." On the 28th of September, 1866, the Register of the United States Land Office certified to the State Land Office that no claim had been filed to this section sixteen, except the pre-emption of one Hancock, which was afterwards abandoned.

Sec. 9 of the Act of July 26, 1866 (14 Stat., 253,) is as follows: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, the decisions of the Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: * * *." The company has brought itself within the provisions of this section, if at the time of the passage of the Act the United States held title to the lands.

On the 22d of April, 1867, Bugbey purchased the portion of

the section on which the premises in controversy are situated, from the State of California, and took a patent. The company does not in any manner connect itself with this title or with that of any other occupant of the section previous to the survey.

In *Sherman vs. Buick*, 93 U. S., 209, it was decided that the State of California took no title to sections 16 and 36, under the Act of 1853, as against an actual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case the State must look for its indemnity to the provisions of section 7 of the Act. As against all the world except the pre-emption settler, the title of the United States, passed to the State upon the completion of the surveys, and if the settler failed to assert his claim or to make it good, the rights of the State became absolute. The language of the Court is (p. 214,) "These things [settlement and improvement under the law] being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land agreeably to the Act of 1826."

In that case the controversy was between the settler, who had perfected his title from the United States, and a purchaser from the State. Here the company does not claim under the settler's title, but seeks by means of it to defeat that of the State, and thus leave the land in a condition to be operated upon by the Act of July 26. The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed. The case stands, therefore, as if at that date the United States had parted with all interest in and control over the property. As the Act of July 26th was not passed until after that time, it follows that it could not operate upon this land in favor of the company.

This disposes of the only federal question in the record, and the judgment is, consequently affirmed.

FINAL PROCEEDINGS BY THE SUPREME COURT OF CALIFORNIA.

March, 27th, 1878.—Upon filing the mandate from the Supreme Court of the United States, and it appearing from the said mandate that the judgment heretofore rendered in this cause has been affirmed, with costs, by said Supreme Court of the United States it is therefore ordered that the remittitur forthwith

issue in this cause in accordance with the judgment rendered herein by this Court, on the 30th day of April, 1875, and that respondent recover his costs in said Supreme Court of the United States, together with costs in this Court.

Supreme Court Unwritten Opinions.

THE case of HARRIS vs. WALKER (No. 5806) decided April 10th, came up on appeal from the Second Judicial District Court (Butte county.) The material facts are as follows : D. D. Harris, as sole survivor of the firm of Sanderson, Harris & Co., sued Ozias Walker for \$686.11, as owing to the firm on a verbal guarantee for goods sold to S. Walker & Co., and S. Walker (a son of said Ozias Walker), between December 1st and 18th, 1875. The findings and judgment of the Court were for plaintiff, from which the defendant appealed, claiming that the verbal promise, if any, was void under the Statute of Frauds, and that defendant was relieved from any promise, if made, by *continuing* trust to S. Walker & Co. Harris claims an original and not collateral promise to pay, and no trust ever given to S. Walker & Co., though charged in that name on the books. The judgment and order is affirmed. *Gifford & Lusk*, attorneys for plaintiff and respondent ; *J. T. Daley*, for defendant and appellant.

THE case of the UNION SAVINGS BANK vs. NOLAN, et al., decided April 10th, was an action brought in the Third District Court—Alameda county—(No. 5604), to recover \$2500 and interest from July 18, 1873, and the amount of five certain notes and interest given to the bank by them for payment of taxes on the land on which the amount was secured, and counsel fees \$250 ; and that a deed of trust which had been given the officers of the bank by Stephen and Mary Nolan, for the land be construed and made a mortgage, and be foreclosed and the premises sold, and the deficiency, if any, be entered in judgment against said Nolan. Defendant did not appear, and judgment went by default. And now come forward three different parties—W. S. Barnes, C. W. Reid, and Chas. Bred-

hoff—with claims against the defendant Nolan, for which they had each attached and levied on the said land, but subsequently to the trust deed given to the bank. The Court decreed a foreclosure and sale of the premises as a mortgage, and the payment of the claims of the bank, and then the three other parties. Nolan appeals to the Supreme Court, urging that the Trustees under the deed refused to perform their duty and sell, and are guilty of fraud and negligence in permitting the default. Case came up on judgment roll, and former judgment affirmed and remittitur ordered forthwith. *C. A. Tuttle*, attorney for appellant; *W. W. Crane*, for respondent; *Montgomery & Martiu*, for the three other defendants.

SNYDER vs. JOHNSON, (No. 6016,) decided April, 15th, comes up from the Third District Court, Alameda county, with *J. R. Glascock*, *W. H. Glascock* and *M. P. Wiggin*, attorneys for plaintiff and appellant, and *Henry Vrooman* and *A. Campbell*, for defendant and respondent. The case was a representative one of four or five others, commenced by citizens of Oakland, against Perry Johnson, the City Tax Collector, to whom they had paid, under protest, certain sums, as taxes or assessments made by the city, under an Act of Legislature to construct a main sewer, approved March, 23d, 1874. Bonds were authorized to be issued by that act, and this assessment was levied on the property of the certain district designated, to meet interest on those bonds for the year 1875-6. It appears that at the usual time of levying taxes for municipal purposes, the City Council had failed to ascertain the proper amount for this purpose, but subsequently the Assessor ascertained and assessed the amount, and entered on the Roll with the taxes. This roll was delivered to defendant as Collector, and he collected of plaintiffs \$76 76, who demanded its return which was refused, and this action followed. Plaintiffs plead unconstitutionality of the act, as operating unequally and unjustly as a special tax—also mandatory—and makes the City Corporation do it at large, instead of the property owners assessed. The judgment was for defendant, by McKee, District Judge. Motion made for a new trial on several strong grounds, but was denied. From the judgment and order appeal was taken, December, 10th, 1877. The judgment and order now affirmed.

THE case of GLIDDEN vs. ROBINSON (No. 5616,) decided April 15th, is an appeal from the Nineteenth District Court, San Francisco, *Gray & Haven*, attorneys for plaintiff and respondent, and *O'Connor & Parlow*, attorneys, and *Edmund L. Gould*, of counsel, for defendant and appellant. The basis of the action is a judgment rendered in November, 1871, by the Supreme Court of New York, against the defendants Lester L. Robinson, Silas Seymour and Alvin C. Morton, for \$2,516.12, with accrued interest at 7 per cent. And

now, Wm. P. Glidden, et al, as executors of James P. Flint, deceased, seek to enforce that judgment. Defendants fought long and persistently, urging a multitude of points, but were met fully at every point, and judgment finally rendered for plaintiffs for \$3,354.82, from which defendants appealed on Bill of Exceptions, but the judgment and order are now affirmed, with Remittur forthwith.

The case of *Burton vs. Robinson*, (No. 5810.) decided April 15th, was an appeal from the 17th District Court, Los Angeles Co. in which *V. E. Howard and Sons* were Attorneys for Plaintiff and Appellant and *Glassell, Chapman and Smiths* for Defendant and Respondent. The action was Ejectment, by several tenants in common, the premises being 160 acres of land in San Diego Co. in which Maria A. Burton, Nellie Burton and Harry H. Burton claims joint interest, adverse to Defendant W. N. Robinson. Decision had been heretofore rendered by Judge Sepulveda, giving a one third interest and costs \$10.25 to Harry H. Burton, one of the Plaintiffs but confirming to the Defendant Robinson the other two thirds interest, and costs \$30.50 as against the other two Plaintiffs barring their cause. That decision had been affirmed upon former appeal; and judgment rendered upon that remittitur. Motion to amend that judgment had been made by Harry H. Burton giving Plaintiff judgment for recovery of the whole which was denied, and on that order was this last appeal taken. The Respondent showed the appeal to be one day too late.]
Judgement and order reaffirmed.

Recent U. S. Land Decisions.

JOSEPH ALSIP.—A soldier who elects to make an additional homestead entry of a less number of acres than he is entitled to, cannot make another entry for the balance.

DEPARTMENT OF THE INTERIOR, }
WASHINGTON, Feby. 6, 1878. }

SIR:—I have considered the appeal of Joseph Alsip, from your decision of October 13th, 1877, refusing to allow him to make a second additional homestead entry.

The records of your office show that Joseph Alsip made homestead entry (original) at Topeka, Kansas, on June 11th, 1870, for the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 30, twp. 7, range 11.

On August 18th, 1874, he made an additional homestead entry at the same office, for the N. W. $\frac{1}{4}$, of N. W. $\frac{1}{4}$ of section 30, twp. 7, range 10, both entries containing 119 81-100 acres. You rejected Mr. Alsip's application on the ground that he had already exhausted his right by his additional entry of August 18, 1874; basing your decision upon the ruling of my predecessor in the case of August Block, *Copp's Land Owner* for May, 1876, page 21. Mr. Alsip has appealed from your decision and requested a modification of my predecessor's rulings on this point.

I can see no good reason why the ruling of my predecessor in the Block case should be modified. The person who has

previously made an original homestead entry of less than 160 acres, has the right to enter so much land as, when added to the quantity previously entered, will not exceed 160 acres, and if he elects to take less than the law allows, such election must be considered a waiver of his right to enter the greater quantity.

Your decision is affirmed, and the papers transmitted with your letter of October 24th, 1877, are herewith returned.

Very respectfully,
C. SCHURZ, Secretary.
The Commissioner of the General Land Office.

CENTRAL PACIFIC RAILROAD vs. STATE OF CALIFORNIA.

[From Copp's Land Owner for March.]

At the hearing held in this case the claim of the State to certain tracts was rejected either because the State failed to show that said lands were swampy or no testimony was offered as to their swampy character.

All public land in California that was actually swampy entered to the State, September 28, 1850, and a subsequent disposition thereof by the Government, either by grant to a railroad company or sale to individuals, could not divest the State's title. The State had the right to present testimony as to the character of each tract mentioned in the published notice of the investigation in this case.

Lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road are not embraced in the grant to the company.

Lands lying within the claimed limits of a Spanish or Mexican grant, which was subsequently adjudged by the Courts to be invalid, inured to the State under the Swamp Grant of September 28, 1850; *provided*, the State proves they were swampy at the date of the grant.

Property is the right and interest which a man has in lands and chattels to the exclusion of others.

The second clause in the 4th section of the Act of July 23d, 1866, confirms absolutely to the State all lands *not in a state of reservation* which had been segregated by her prior to July 23, 1866, if the State surveys were made on the rectangular system, whether the lands had been surveyed by the United States or not, or whether they were swampy or dry lands, provided no valid pre-emption or homestead claim or other right had been acquired by any settler as provided in the first section of the Act.

CALIFORNIA LEGAL RECORD.

VOL. I.

APRIL 27, 1878.

No. 5

Legal Notes.

WE publish this week a very important case recently decided finally in the Probate Court of this city, known as the "Cunningham Will Case," which decides an important question upon undue influence employed in the making and execution of wills by persons of intemperate habits. (See S. F. Law Journal of Nov. 30, 1877, pp 150.)

SAN FRANCISCO TAX CASES.—The Supreme Court has been occupied considerably during the past week in hearing the several tax cases of this city. Decisions will soon be rendered—and reported.

THE large number of decisions filed since our last issue, has obliged us to postpone some of the "Unwritten Opinions" till our next number; and the session of the Court in Sacramento has necessarily somewhat delayed this issue,—which we hope will not again occur.

SUMMER VACATION OF THE SAN FRANCISCO COURTS.—The Bar Association recently adopted the following:

Resolved, That this Association hereby respectfully request the several Courts, Federal and State, holding their sessions in this city, to adjourn for the usual summer vacation from May 1st to and including July 8, 1878. A committee was appointed to present the resolution to the Courts, and to ask on behalf of the Bar that the same be granted. The Judges of the higher Courts have signified a compliance with the request.

WORK OF THE NEW COURT OF CRIMINAL APPEALS.—The opening of the new Municipal Court of Appeals will relieve the County Court of a great burden of appeals from the Justices' Court, and the new Court, which will be organized early in May, will be furnished with a calender of about 740 cases to start in on. The County Court will hereafter hear appeals from the City Criminal Court and the Police Judge's Court and such special proceedings as forcible entry and detainer cases, proceedings in insolvency, habeas corpus, Grand Jury, the opening or regrading of streets, applications by sole traders or for change of name, disincorporation of corporations, etc.

A NOVEL DEFENSE.—The evidence in the case of the United States vs. Charles K. Clark et als., was concluded in the United Circuit Court Thursday morning. The argument will be heard next Monday. The action was brought to recover \$6,000 on a bond given as security for purchases of of revenue stmps by Clarke as manufacturer of matches and cigars. The limit of time for such a credit, under the law, is sixty days. The defense is rather novel. Clarke and his bondsmen claim that at the end of each sixty days accounts between the Government and the manufacturer should have been adjusted and a new bond given, and under this theory the defendants set up that their bond, given several years ago, is discharged.

A HEAVY CLAIM.—The case of William N. Thompson vs. James Patterson et al., Executors, etc., is on argument before the Twelfth District Court. The action was brought in 1862 by Thompson, who had with Daniel Gibb leased the New Idra Quicksilver mine. Thompson managed the works and Gibb disposed of the products. The former now claims that \$200,000 is due him from Gibb's executors.

CALIFORNIA LEGAL RECORD.

Supreme Court of California.

[April Term, 1878.]

[No. 5,989.]

[Filed April 19, 1878.]

PIERCE vs. FELTER.

Appeal from Eighteenth District Court, San Bernardino Co.,
W. T. MCNEALY, Judge.

REAL ESTATE INTEREST—WHEN ACTION CAN BE MAINTAINED.—*Any person* holding an interest in real estate,—even if less than title in fee,—can bring action against another claiming an adverse interest, for the purpose of determining such adverse claim. (Sec. 738, Code of Civil Procedure.)

STATEMENT OF FACTS.

The plaintiff Henry Pierce, having a leasehold interest in 2,580 acres of the "Rancho Muscupiabe" which is watered by the Lytle creek, flowing through said land about three miles, brings this action against defendants, A. J. Felter and eighty-six others, to enjoin them from diverting and appropriating the waters of said creek. Defendants demur on ground of plaintiff's title, and in answer, deny his claim, and claim a prior right to the water in point of time, and also by the consent of the owners of "Rancho de San Bernardino," over which lands the creek "has flowed from time immemorial," and also claim the consent of the plaintiff and his agents for more than five years, and to within two years of this action, and that cause of action is barred by sections 315 to 325, of Code of Civil Procedure.

Trial had December 31, 1877, by Court, without jury, and a non-suit granted, and cause dismissed. Bill of exceptions— and appeal taken February 5, 1878.

H. C. Rolfe, attorney for plaintiff and appellant.

Waters & Swing and *C. W. C. Rowell*, for defendant and respondent.

OPINION BY THE COURT.

The only question presented in this case is whether the owner of an estate or interest in land, less than an estate in fee, can maintain an action for the determination of an adverse claim made by another person. We think that he can. The Code of Civil Procedure (section 738) provides, in terms, that an action may be brought by *any person* against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

We are unable to see any reason why the benefit of this statute, remedial in its character, should be confined to estates in fee, when the words employed by the Legislature embrace

every interest or estate in lands, of which the law takes cognizance.

Judgment reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 5886.]

[Filed April 19, 1878.]

C. A. FLANDERS vs. G. S. LOCKE.

Appeal from Fifteenth District Court, San Joaquin County,
S. A. BOOKER, Judge.

DRIFTED LUMBER—DAMAGES.—The owner of drifted lumber in an action to recover same from parties on whose land it has lodged, is not obliged to prove that said lands did not suffer damage; but only that he owns the lumber, and that it is in possession of the defendant, who refuses to deliver it on demand.

If defendant has any lien on the property for damages, he must prove damages sustained. The *claim* by defendant of a specific sum as damages, if refused by plaintiff, does not impose on plaintiff any duty as to the selection of appraisers of damages.

STATEMENT OF FACTS.

Action was brought by plaintiff, September 6, 1876, for recovery of \$100, the value of certain sugar-pine bolts and cedar posts owned by him, which had drifted down the Mokelumne river, and lodged on the land of defendant. A general denial was filed by defendant, and the cause tried by jury, but upon close of the testimony for plaintiff, the court granted a non-suit and awarded costs, \$86, to defendant, on the ground that plaintiff had not caused the damage to be appraised, and then tendered the amount to defendant. It was shown in evidence that before commencement of the action plaintiff asked leave to remove the lumber, and offered to pay the damage suffered by defendant. Defendant asked \$100, which plaintiff declined to pay. Defendant afterward hauled off and cut up the lumber, claiming it as driftwood. On July 3d, 1877, plaintiff moved for a new trial, which was denied, and he appealed on September 10, 1877.

Terry, McKinn & Terry, attorneys for plaintiff and appellant.

Byers & Elliott, attorneys for defendant and respondent.

OPINION BY THE COURT.

It was not the duty of the plaintiff to prove as part of his case, that defendant did not suffer any damage. It was enough for him to show that the lumber was his, and in the possession of defendant, and that the latter refused to deliver it on demand.

If the defendant had any lien on the property by reason of

damages sustained, it was for him to prove the damages.

The *claim* of the defendant that he was damaged in the sum of \$100 did not impose on plaintiff any duty with respect to the selection of appraisers, and this because no intelligible mode is provided by statute for the selection of appraisers.

Section 2,390 of the Political Code reads as follows:

"Whenever any lumber drifts upon any island in any of the waters of this State, or upon the bank of any such waters, the owner of the lumber may remove it upon the payment or tendering to the owner or occupant of the land the amount of the damages which he has sustained by reason thereof, and which may accrue in its removal; and if the parties cannot agree as to the amount of such damages, either party may have the same appraised by two disinterested citizens of the county, who may hear proofs and determine the same, at the expense of the owner of the lumber."

The section apparently attempts to give the party first moving the power to select his *own* judges for the determination of the controversy between himself and his less diligent opponent, and seems to make their judgment as to the amount of damages sustained conclusive upon him who has no voice in their appointment.

It is true it is provided that the citizens selected shall be "disinterested," but inasmuch as the most active of the parties is given the exclusive privilege of determining their disinterested character, this proviso hardly affords an efficient portion to him who has not been consulted in the selection of the arbitrators.

Judgment and order reversed and cause remanded for a new trial.

[No. 5885.]

[Filed April 19, 1878.]

FLANDERS vs. LOCKE.

Appeal from Fifth District Court, San Joaquin County, S. A
BOOKER, Judge.

TRESPASS—DAMAGES.—The floating of lumber in a river, and its lodgment upon the land along its banks, does not constitute the owner of the lumber a trespasser upon said land; nor can the owner of the land, after disclaiming damage from the lumber, take advantage of non-tender for damages, in an action for recovery of the lumber.

STATEMENT OF FACTS.

In the fall of 1875, C. A. Flanders and A. S. Bryant, floated a quantity of sugar pine blocks and cedar posts, valued at \$1,417.40, down the Mokelumne river from Amador county, which lodged on the river banks upon land of the defendant, D. J. Locke, and he hauled the greater portion of them to his house during the winter, and split up into cord wood. But, before this was done, Flanders & Bryant, by Flanders, demanded the property from Locke, offering to pay any damage he had sustained. He refused the demand, but did not claim to have suffered damage. Suit was brought September 6, 1876; was tried by jury, May 25, 1877, and a non-suit granted on the ground that plaintiff was a trespasser, and had not ascertained and tendered to defendant the amount of damage sustained. Motion for new trial was denied August 28, 1877, and appeal taken by plaintiff, September 10, 1877.

Terry, McKinne & Terry, attorneys for plaintiff and appellant.

Byers & Elliott, attorneys for defendant and respondent.

OPINION BY THE COURT.

The plaintiff was not a trespasser upon the land of the defendant, and as the latter had expressly disclaimed any damage, the plaintiff should not have been non-suited for the failure to tender the amount of the supposed damage.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 4459.]

[Filed April 19, 1878.]

THE STOCKTON & LINDEN G. R. CO.

vs.

THE STOCKTON & COPPEROPOLIS R. R. CO.

Appeal from Fifth District Court. San Joaquin County, S. A.

BOOKER, Judge.

DAMAGES OF CORPORATE ROAD COMPANIES.—Damages for the infringement of one Corporate Road Company upon the rights of another, should be limited to the actual injury sustained, and not granted for the entire value of the land composing the road bed.

STATEMENT OF FACTS.

On August 29, 1869, the Supervisors of San Joaquin county, granted to the plaintiff the rights to construct and gravel for a toll road, that part of Weber Avenue between East and Aurora streets, in the City of Stockton, which was so done for a distance of 2290 feet along its centre, and tolls were so collected. On November 25, 1870, the Common Council of the City of Stockton granted

to the S. & C. R. R. the privilege of building its track along the central line of the same said Weber avenue, for its entire length, and the track was laid prior to December 10, 1870, and right to maintain the same granted by the City Council, February 20, 1871. Plaintiff had already constructed the gravel road along Weber Avenue in 1868, prior to its being included in the city, so that its rights had attached by use and possession before the granting of right of way to the Railroad. Action was brought December 10, 1870, claiming damages to amount of full value of the land and costs of suit. Defendants claimed that the Gravel Road Co., was not a corporation *de jure*, even if *de facto*, and that their right to collect tolls having expired in 1869, they could have sustained only nominal damages, not being the owners of the land taken. Cause tried May 6, 1874, and verdict for plaintiff of \$5,500, and costs \$249.80. Defendants moved for a new trial on June 18, which was denied, and appeal taken August 6, 1874.

Terry & McKinnis, attorneys for plaintiff and respondent.

W. L. Dudley and *J. H. Budd*, attorneys for defendant and appellant.

OPINION BY THE COURT.

Upon the former appeal the decision here proceeded only upon the point that the plaintiff being a corporation *de facto*, should not have been non-suited, because not showing itself to have been a corporation *de jure*.

Upon the return of the cause to the Court below, a new trial was had, and resulted in a verdict for the plaintiff for some \$5,500.

The plaintiff would seem to have recovered the entire value of the land composing the bed of the road, for the disturbance of which the action was brought; while it is clear that the recovery should have been limited to the amount of the damages sustained by reason of the acts of the defendant—which, as the case now appears in the record, are but nominal.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith

[No. 5792.]

[Filed April 19, 1878.]

SIMON, JACOBS & Co. vs. SCOTT

Appeal from the Thirteenth District Court, Merced County—

J. B. CAMPBELL, Judge.

PLEADINGS—GOODS SOLD TO A WIFE.—Recovery cannot be had for goods sold to a party, in the absence of an averment in the complaint that they were sold and delivered to him. If sold to a wife, (she being circumstantially authorized to purchase same,) averment must be made that they were sold and delivered to the husband, or no recovery can be had from him.

DEMURRER.—When averment is not so made, a demurrer by defendant should be sustained.

STATEMENT OF FACTS.

The firm of Simons, Jacobs & Co., merchants of Merced, sold various goods for housekeeping use, amounting to \$1,066.02, to Mary S. Scott, wife of Samuel Scott, the defendant, between August 22 and September 7, 1876, for which plaintiff, claims payment in coin, and interest after sixty days, and brings action against Samuel Scott, not making Mary S. a party.

Defendant claims he did not in any way authorize the firm to give credit to his wife, and enters demurrer, that she should be made a party to the suit, which was overruled and judgment rendered for plaintiff for amount of bill and costs. Defendant appealed August 14th, 1877.

Ward & Wigginton, and Terry, McKinne & Terry, attorneys for plaintiff and respondents.

Thos. Bodley and W. P. Veuve, attorneys for defendant and appellant.

OPINION BY THE COURT.

The complaint does not allege a sale and delivery of goods to defendant.

Whether defendant is liable for the goods furnished to the wife or not, it is certain that plaintiffs cannot recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to *defendant*, and the averment should have been to that effect. The averments in respect to furnishing the goods to the wife, etc., might have been omitted as mere evidence, and not the statement of ultimate facts.

The demurrer should have been sustained. Judgment reversed and cause remanded, with direction to the Court below to sustain the demurrer to the complaint.

[No. 4964.]

[Filed April 18, 1878.]

ROBINSON vs. GLEESON.

Appeal from 17th District Court—Los Angeles County.

SEPULVEDA, JUDGE.

SUCCESSION OF TITLE AND INTEREST IN LANDS.—Purchasers of land, from parties whose title is contested or disturbed, cannot, if in possession, and having made improvements, be deprived of their interest or claim of title

without a hearing; nor can such controversy be completely determined in their absence.

AMENDED COMPLAINT.—When facts of such purchase and possession are brought to the attention of the parties in contest of title, complaint should be amended to embrace such persons, and if neglected, the Court, of its own motion, should order it done at the proper time, in order to settle the whole controversy in one action.

STATEMENT OF FACTS.

A. Robinson, as trustee,—by Deed of Trust from A. Stearns, of May 25th 1868—made two contracts for sale of lands to defendant, Wm. H. Gleason, one of February 6th, 1868, of 120 acres, and one on March 9, 1870, of 160 acres. On the first defendant, paid down \$340, on the second, \$520—gave notes for the balances and took possession. Defendant then sold of the 120 acre tract, 10 acres each to David Taylor, Wm. McCracken, Robert Cummings, C. J. Lansour, and James McDonald, who took possession, made improvements, and still occupy the land. Defendant Gleason, not paying his notes when due, action was brought to declare the contracts forfeited, and restore the premises to plaintiff. Upon trial judgment was for plaintiff, and to debar defendant from all further title and interest, and costs \$67.20. Motion for new trial was denied, and an appeal taken, upon which the Supreme Court modified the judgment, ordering the defendant's notes to be returned. Defendant then asks for a rehearing, claiming that if notes are returned the money before paid should be returned also, as land is now worth \$50 per acre.—Also that the parties to whom he had resold should become parties to the action—they being in actual and open possession, etc.—This was objected to because their contracts of purchase were not of record. New trial being denied, appeal was taken on these points, which is now decided.

Drumson & Eastman, attorneys for plaintiff and respondent.

H. S. Brown and *R. M. Widney*, attorneys for defendant and appellant.

OPINION BY THE COURT.

Among the matters of defense the answer avers that after the purchase by the defendant from the plaintiff of the land in controversy, and prior to the commencement of the action, he, the defendant, sold portions of the land to Taylor, McCracken, Cummins, Lansour and McDonald, ten acres to each, and the purchasers entered into possession, erected houses and made other improvements on the land, and they or their assigns were at the commencement of the action, and still are in the open and notorious possession thereof, of which the plaintiff had notice. The answer raises the point that these persons were necessary parties to the action, without whose presence a complete determination of the controversy cannot be had. At the trial it was admitted that all the averments of the answer in this particular were true, with the additional fact that the contracts of sale from the defendant to

Taylor and others were not of record at the time of the commencement of the action, and that the plaintiff had no actual notice thereof; but that Northam and Martin, two of the beneficiaries of the trust, had such notice. It is contended on behalf of the plaintiff, that it was unnecessary to make these persons parties defendant, for the reason that their contracts of purchase were not of record at the commencement of the action, and that the plaintiff had no actual notice thereof. But section 726 of the Code of Civil Procedure applies only to an action for the foreclosure of a mortgage, and section 754, only to an action for partition. The present action is not within either of these categories, and these sections do not apply to it. The purchasers from the defendant who had succeeded in his interest in and to the several tracts sold to them respectively, and who had entered into the possession and erected improvements thereon, could not be deprived of their interest or claim of title, nor be disturbed in the possession, without first having had their day in Court; nor could there be a complete determination of the controversy in the absence of these parties. When the facts were brought to the attention of the plaintiff by the answer, it was his duty to amend his complaint and bring in these persons, and if he neglected to do so, the Court of its own motion should have ordered it to be done, at the proper time, in order that the whole controversy might be settled in one action.

Judgment and order reversed and cause remanded for a new trial.

[No. 5675.]

[Filed April 19, 1878.]

LORENZ vs. JACOBS

Appeal from Ninth District Court, Trinity County, A. M.
ROSBOROUGH, Judge.

TENANCY IN COMMON.—PARTITION, OR SALE OF COMMON PROPERTY.—Any of the co-tenants of real property may institute proceedings for a *partition*, or a *sale*, if partition cannot be made without great prejudice to the owners. But in either case, it is indispensable that an interlocutory decree be first entered, definitely ascertaining the rights and interests of the respective parties in the subject matter.

STATEMENT OF FACTS.

Henry Lorenz, Nicholas Lorenz and Jacob Liebrandt plaintiffs; and Bartel Jacobs, Henry Jacobs, David Evans and Chas. H. Bartlett, defendants in this

action, all claim to be joint owners of a certain water ditch taking water from Connor creek to Red Hill, for mining and other purposes.

The respective claims and ownership of the volume of water, are such that the parties could not agree, nor could a partition be well made; hence plaintiffs ask judgment and decree for sale of the entire property, and distribution of the proceeds.

After hearing a large mass of testimony, and recurring to a former action of same nature on same property, decided in 1874, in which McGillivray was plaintiff—the court, concurring in the opinion then expressed by the Supreme Court, gave judgment that plaintiffs were entitled to relief, and decreed that the property should be sold, and the proceeds distributed;—and referees were appointed. Motion for new trial;—appeal taken by defendants, April 23, 1877.

O. E. Williams and Howe & Rosenbaum, attorneys for plaintiffs and respondents.

Burch & Griffith, and *Jno. G. Irwin & E. P. Lovejoy*, for defendants and appellants.

OPINION BY THE COURT.

Proceedings may be instituted by any of the cotenants of real property, as provided in the Code of Civil Procedure (section 752), for a partition thereof according to their respective rights, or for a sale thereof if it appear that the partition cannot be made without great prejudice to the owners. But whether partition is to be ordered or a sale directed, it is indispensable that a decree, interlocutory in its character, be first entered, definitely ascertaining the rights and interests of the respective parties in the subject matter. In case a sale is to be directed, it is impossible for any party, in the absence of such an interlocutory decree, to know whether he is interested in maintaining or resisting the proceedings.

The interlocutory decree entered below in this case is entirely silent as to the quantity or interest of either of the parties to the proceedings, and is erroneous in that respect. It is true that the Court has announced certain conclusions of law which, if they should be adhered to below, would go far to furnish the basis for such a decree; but the parties cannot bring an appeal from these conclusions, but only from the interlocutory decree itself, which decree when properly entered will become conclusive of their respective rights unless such appeal be taken therefrom within sixty days from its entry in the minutes of the Court. (*Code of Civil Procedure*, section 939, subdivision 3.)

Decree and order denying a new trial reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 5615.]

[Filed April 19, 1878.]

JAMES ET AL. vs. JOHN CENTER ET AL.

Appeal from Thirteenth District Court, Fresno County, ALEX.
DEERING, Judge.

PRACTICE AND PLEADINGS.—DISMISSAL OF ACTIONS.—COUNTER-CLAIMS.—A plaintiff has right to dismiss his action, before trial, in the absence of a counter-claim.—Entry of judgment of dismissal by the Clerk is proper when no counter-claim has been made. (c. c. p 581.)

Matters set forth in cross-bills,—not arising out of the transaction set forth in the complaint, and not connected with the subject of the action,—do not constitute a counter-claim.—(c. c. p 438, sub. 1.)

An order made after rendition of judgment is subject of appeal.

STATEMENT OF THE CASE.

The Legislature, by Act of April 11th, 1857, granted four persons, called "Legislative Grantees," the right to reclaim certain swamp and overflowed lands in Fresno and Kern counties, between the San Joaquin River and Tulare Lake, and to construct and operate a canal from the river to the lake, and to Kern lake; and the right of way through any State lands, and two hundred feet each side; and one-half of the reclaimed land if reclaimed inside of five years. The canal was begun in the time prescribed; then the four "Legislative Grantees" conveyed their privilege to one Cobb and Brown, who agreed, in consideration, to hold three-quarters of said lands and proceeds in trust for the grantors. Afterwards, in June 11th, 1871, Cobb and Brown agreed with John Center and others, for the construction of the canal, and they formed the corporation known as the "Visalia Canal and Transportation Company," on June 11th, 1861. In 1862, the Legislature amended the original Act, giving three years more time in reclaiming the lands, and divided them into three districts, granting the one-half of the lands in any one of them upon the completion of the canal, and reclamation therein. Then immediately John Center et al., abandoned the whole project, and so declared to Cobb and Brown, etc.,—who also abandoned.

Then Thomas Baker and Harvey S. Brown, relying on the abandonment, purchased of the "Legislative Grantees," all their interest for \$10,000—got from the Legislature a further act of relief, and at once commenced reclaiming, and completed same in time, and satisfactorily to the Governor and Surveyor General, and on November 11, 1867, a patent was issued—called the "Montgomery Patent." Ever since the abandonment, Baker and Brown are all who have held possession of the lands, paid taxes, etc. Center asserted no possession till recently—yet, on April 1st, 1862, Center, et al, conveyed to one Clarkson 1,300 acres of said land, and he to C. H. Wakelee, and he conveyed portions of same to others, who all had notice of the abandonment by Center, et al.

On May 15th, 1874, Delos Lake claimed to have obtained from the "V. Canal and T. Co." coupons calling for most of said land, without any consideration,

and on same day, he, without consideration, conveyed to Center and Boyd as joint tenants all of said interest.

And now Jefferson G. James, and 33 others, as owners through the completed title and patent, bring action against Center and 35 others, to quiet title; and, after various demurrers, denials, and cross bills, plaintiffs finally dismiss the action before reaching trial—and defendants recover costs—by judgment rendered February 15th, 1877.

On February 10th, 1877, an order was made to recall dismissal, and on March 2d, 1877, trial of the cause was set for March 12th, 1877.

Appeal was taken by plaintiffs from this restoration to the calendar, on the ground that the order was beyond the Court's jurisdiction, being set for the next term, when the power of the Court had expired,

Stetson & Houghton, and *Wigginton & Marks*, attorneys for plaintiffs and appellants.—and *McAllister & Bergin*, of counsel.

Clark Churchill, and *J. H. Brewer*, attorneys for defendants and respondents. *Nourse & Phelps*, attorneys for Stephen W. Shaw.

OPINION BY THE COURT.

The judgment of dismissal in form, entered by the clerk was properly entered, inasmuch as no counter claim had been made, (*C. C. P.* 581.)

The matters set forth in the cross bills, so called, did not constitute a counter claim, because not arising out of the transaction set forth in the complaint and not connected with the subject of the action, (*C. C. P.* 438, *sub. 1.*)

The order appealed from was an order made after judgment and therefore the subject of appeal.

The order setting aside the judgment was erroneous, because the plaintiff had the right to dismiss the action in the absence of a counter claim. Order reversed.

[No. 5796.]

[Filed April 18, 1878.]

HERSHEY vs. DENNIS.

Appeal from Sixth District Court, Yolo County, S. C. DEN-
SON, Judge.

MORTGAGE REDEMPTION—DEFICIENCY—SHERIFF'S DEED.—No lien for a docketed deficiency on a mortgage sale, can attach to the premises sold, after a declaration of homestead.

The mortgagee, therefore, is not authorized to redeem from the purchaser at the mortgage sale, hence the purchaser can acquire no right as *redeemtion* from a reassignment by the mortgagee.

The mortgagor, or his grantee, can redeem from the purchaser on payment of his bid and costs; hence, he having tendered to the sheriff a sufficient sum to redeem, the sheriff can not execute a deed to the purchaser, or assignee of the mortgagee.

STATEMENT OF FACTS.

On February 24th, 1874, H. W. Diehl and wife, owning certain land in Yolo Co.—mortgaged it to Geo. Geary and D. Fraser,—and on next day, again mortgaged same to J. R. Barret. On January 5th, 1875, Diehl and wife made a Homestead declaration on the premises. In April, 1875, an action was brought to foreclose the Geary and Fraser mortgage. Barret filed a cross complaint claiming judgment on his mortgage. On January 21, 1876, Barret assigned his mortgage to Benj. Dennis. On February 2, 1876, judgment was entered foreclosing both mortgages,—directing sale of the property and applying proceeds—First, to pay Geary and Fraser, then the Barret mortgage.—and directing a docket entry in B.'s favor for any deficiency.—Sheriff sold to Dennis for enough to cover first mortgage and a portion of the second, but leaving a balance of \$1,287.99 on the Barret mortgage, held by Dennis, by assignment, which was docketed against Diehl. On May 17, 1876, Barret produced a copy of this docket, paid Dennis \$5,106.70 as a redemption of the property, and received a certificate of redemption. On the same day, Barret assigned this certificate back to Dennis. On October 21, 1876, Diehl and wife granted the premises to plaintiff Hershey, and on the same day he tendered to the Sheriff \$5,650, to redeem the property—on his own account, and not for Diehl and wife. The officer refused the tender, and on October 25th, executed a deed to Dennis, not as purchaser, but as assignee of redemption, upon which Hershey brought suit in December, 1876. On April 13th, 1877, a judgment was rendered in favor of defendant Dennis, for his costs, and against plaintiffs Hershey, and Diehl and wife, who take nothing by the action. Trial was by Court, without jury, and plaintiffs filed bill of exceptions and moved for new trial,—which was denied,—and appeal taken August 13th, 1877.

J. C. Ball, and *J. W. Armstrong*, attorneys for plaintiffs and appellants.

W. B. Treadwell, and *E. R. Bush*, attorneys for defendants and respondents.

OPINION BY THE COURT.

Assuming, for the purposes of this case, that Barrett had a lien by virtue of the docketed deficiency arising from the mortgage sale, except for the homestead, it is plain that no such lien could attach after the declaration of homestead.

Barrett, therefore, occupied no such relation to the property or parties as authorized him to redeem from the purchaser at the mortgage sale; and Dennis, the purchaser, acquired no right as *redemptioner* by reason of a reassignment from Barrett.

It follows that the mortgagor or his grantee could redeem from Dennis on payment of the amount of his bid and costs, etc. The plaintiff having tendered a sufficient sum to redeem, the Sheriff had no power to execute a conveyance to the defendant Dennis.

Jndgment and order reversed and cause remanded for a new trial.

[Mr. Justice Crocker did not express an opinion in the case.]

REIDY vs. SCOTT ET AL.

Appeal from Tirteenth District Court, Merced County, J. B. CAMPBELL, Judge.

JUDGMENT BY DEFAULT.—DEFENSE.—A judgment by default may be opened where the affidavit of merit in the defense is sufficient,—i. e.,—supported by facts in the answer filed, which, if proved, would constitute a meritorious defense,—being “based on a *full and fair statement of all the facts of the case.*”

STATEMENT OF FACTS.

This is a case of judgment by default for plaintiffs against defendants.—John L. Reidy and Joseph Nolan commenced an action against Samuel Scott and Mary S. Scott, in which process was regularly served on defendants, but they failed to answer, and hence, judgment by default was entered by the Clerk of the Court on May 7th, 1877. On July 5th, 1877, defendant moved to set aside the default, and for privilege to file answer, alleging fact of a mistake by detention of his answer in hands of Wells, Fargo & Co., and its only reaching Merced on Sunday, May 6th, and could not be filed till 7th, on which day the default was entered.—Affidavits of defendant, and his attorneys also set forth his having a good defense, etc. But on July 27th, the motion was denied,—and an appeal was taken both from the judgment, and the order.

Bodley & Campbell, and Chas. H. Marks, counsel for defendant and appellant.

R. H. Ward, and P. D. Wigginton, attorneys for plaintiff and respondent.

OPINION BY THE COURT.

If the affidavit of merits is sufficient, we are satisfied that, under the views expressed in *Watson vs. S. F. and H. B. R. R. Company*, 41, *Cal.*, 17, the Court should have granted the motion to open the default. The answer, which was filed on the same day the default was entered, states facts which, if proved, would constitute a meritorious defense. The statements in the affidavit of defendant that, he is advised that he has a “*good and perfect defense,*” and in the affidavit of his attorney that, in his opinion, defendant has a good defense, although in artificial averments of the fact that he has a defense on the merits, are to be referred to the answer actually filed. In *People vs. Rains*, (23 *Cal.*, 129,) the affidavit of the

defendant's attorney was to the effect that he had mistaken the day of service, and that he prepared a *demurrer* to the complaint. The Court held that when the affidavit shows that the defense rests on matters appearing on the face of the complaint, (by which, of course, is meant matters of defense,) which except for the interposition of a demurrer, would be deemed to be waived,) the defense is merely of a technical character, and the affidavit is insufficient. But here an answer was prepared, and the advice of the attorney, that defendant had a good and perfect defense, was based on a *full and fair statement of all the facts of the case*. (See defendant's affidavit.) We think the default should have been set aside. Judgment and order reversed and cause remanded.

San Francisco Probate Court.

THE CUNNINGHAM WILL CASE.

REPORTED FOR THE LEGAL RECORD BY ROB'T. ASH, ESQ.

Mary Cunningham, having the title to lot on the corner of Dora and Harrison streets in her own name, died July 9, 1876, when H. P. Gallagher, a Catholic priest, filed a paper as her last will which gave to him \$1,000 in trust for the Catholic Orphan Asylums of this State, and the rest to be divided among her nephews and neices residing in the Eastern States. This paper was not dated. She signed her name by mark, and made two different marks to the paper; the attesting witness wrote part of his name, then crossed it out, and then wrote it again. The clause appointing Gallagher executor waived bonds, gave him full power to sell, manage and dispose of her estate as fully as though he owned it.

Her husband contested this will on the ground that she never signed it; that it was not legally executed; that she was incompetent to make or revoke a will by reason of intemperance; and that she was unduly influenced to make it by H. P. Gallagher and Bell *alias* Eliza Coughlin,—and filed a will dated December 14, 1870, which gave the entire estate to him, perfectly executed, and claimed it was his wife's last will, which was also contested by H. P. Gallagher. The case was tried first on August 22, 1876, and the Court directed a verdict in favor of the last will, and the contestant, the husband, appealed to the Supreme Court.

The case was No. 5385, and on October 30, 1877, the Supreme Court filed its opinion reversing the judgment and ordering a new trial on the instruction concerning undue influence. (Opinion published in the number of Nov. 3 of the Journal—bound volume page 150.) The Court awarded costs to appellant. The contestant then filed a petition for re-hearing, asking the opinion of the Court on the admissibility of the declarations of the wife concerning undue influence, sound mind, etc., as detailed by the husband, but this question was not decided by the Court, and the case was again tried in the Probate Court, March 22, 1878. On the first trial contestant offered the will in contest in evidence, as evidence of undue influence and mental incapacity.

One of the attesting witnesses was dead, and the only living witness fixed one date and a witness present another and later date; and a witness who saw the deceased on the occasion, another date still later. The husband produced over thirty witnesses, and proved that his wife, at the alleged date of the will, April 29, 1874, was, and for more than a year previous, and up to the time of her death, incapacitated from making a will, by reason of intemperance; that on the last three weeks of April, 1874, she was on a spree and scarcely drew a sober breath; that in August of the same year, she was sent to the Inebriate Asylum with *Delirium Tremens*. The attesting witness swore she was sober on the day she executed the paper, and that he had never seen her drunk, and defined drunkenness as follows: When a person "is drinking under the influence of liquor, as long as they can walk gay and happy—"when the entire sidewalk is necessary for their use in walking, they are boozy; and when they get down in the street, "fall down and cannot get up, they are drunk."

All the tenants who lived on the property, testified that she was incompetent to transact business when drunk or under the influence of liquor. That she neglected her house entirely; would fall down stairs, and roar and fall down in the street, and keep her neighbors awake nearly all night. Police officers were called often to keep her quiet under threats of arresting her. Many of her neighbors saw her drunk in the street, and assisted her to get up stairs in her own house. She kept a bottle of medicine constantly in the house to take when she could not sleep from liquor. She could not eat when she was on a spree, and was wild, foolish and rambling in conversation. She had disputes with tenants about the payment of rent, many transactions being forgotten by her entirely. Many of

them would wait until she sobered down a little to pay her rent.

The doctor told her if she did not quit drinking she would not live three months longer. About May, 1876, she asked the doctor for a certificate that she was sober so she could get a will Father Gallagher had; that she had asked him for it, and he always said, "Go and get sober and then come;" that she made it when she was under the influence of liquor and did not know what it contained; that she had made a will and gave the property to her husband, and wanted it to remain so. The doctor suggested that she make another will, but she declined, saying that would make three, and if she could destroy the last will she could be satisfied. There was evidence that Bell *alias* Eliza Coughlan, had taken her from home when she had collected rent, telling her she had dreamed she was killed the night before by her husband, and after her death she declared to the husband she had fixed him, as he would never get a cent. It was found that the attesting witness and this woman were cousins: that on the day the paper was executed, she took Mrs. Cunningham first to Father Gallagher's house, then to his attorney, then went about ten blocks for her cousin to witness the will; also, that one of the persons who was named as legatee in the will was dead before the date of the same, and that she knew it.

The contestant rested his case. The proponent offered evidence of women across the streets who had seen her every day for several years but *never* saw her drunk, not even once in seven years. They testified to recent conversations with the deceased in which she complained of her husband, and only on one occasion did any of them see her husband with a lamp in one hand and the other raised as if to strike his wife, but they did not see him strike her once.

After an elaborate charge by the Court and instructions submitted by counsel the following issues were submitted in questions and answers as follows:

Did Mary Cunningham, the deceased, sign the paper dated December 14, 1870, as and for her last will? The answer was: yes.

Was, she, then, of sound and disposing mind and free from restraint, undue influence, menace, duress and fraud? Answer: Yes.

Was the paper filed in this Court, July 12, 1876, signed by the said Mary Cunningham? Answer: No.

If not signed by her, was it signed by any person for her

in her presence and by her express direction? Answer: No.

If not signed by her, was it signed by any person for her in her presence and by her express direction? Yes.

When was that paper signed? April 29, 1874.

Was said Mary Cunningham, at the time of the execution of said paper, of sound and disposing mind? No.

If of unsound mind, from what cause? Habitual intemperance.

Was said paper signed in the presence of two witnesses, and did she publish the same as her last will and request them to sign as witnesses, and did they sign in the presence of each other? Yes.

If said alleged will was signed by said Mary Cunningham, did she sign the same under the restraint, undue influence or fraudulent misrepresentations of any one? Yes.

If yes, who was the person? Eliza Coughlan.

Verdict then rendered, declaring the last will offered by H. P. Gallagher, void; and giving the entire estate to the husband, under the will of December 14th, 1870, as offered by him for probate.

Robert Ash, attorney for contestant.

J. F. Sullivan, for proponent.

Recent U. S. Land Decisions.

Proposed Change in the Pre-emption Laws.

The Committee on Public Lands in the United States Senate, reported on the 11th of April, a bill making an important change in the Pre-emption Laws, which, if it becomes a law, will prove of great benefit to settlers on the public lands.

The bill provides, that every pre-emption settler, or his widow or children, if still in possession of the land, shall be entitled to repayment of the difference between the price paid and the Government minimum price of said land; provided, that it would, if vacant at the time of application for repayment, be subject to sale or entry at the minimum rate of \$1.25 per acre. The bill also allows homestead settlers who have been restricted to 80 acres to enter an additional tract of 80 acres adjoining the land embraced in the original entry; or if they or their widows or orphaned children so elect, they may

surrender the original entry for cancellation and thereupon be entitled to enter 160 acres under the homestead laws elsewhere without payment of additional fees, and their residence and cultivation under the original entry shall be credited upon the new or additional entry; provided that in every case there shall be at least one year's residence and cultivation required before the issuance of patent for the second entry. It also provides that the benefits of the Act shall not extend to parties who have sold or in any way attempted to alienate the land embraced in their original entries, or to any person who has attempted to alienate his rights under the Act of 1872 relative to additional homestead for soldiers and sailors.

Interesting Decision in a California Land Case.

WASHINGTON, April 28th.—The Secretary of the Interior has just rendered an important decision in the case of Sullivan et al. vs. Walter O'Mara et al., involving title to certain lands formerly within the limits of the Stockton and Copperopolis railroad grant, and establishing a precedent which substantially decides forty or fifty similar cases now before the Department on appeal from various parts of California. This railroad grant was declared forfeited by Congress in June, 1874, and the lands were restored to pre-emption, and homestead entry September 4th, under instructions from the Interior Department, based on an executive order issued by President Grant, July 9th. Prior to September 4th, however, Sullivan and various other parties, executed declaratory statements dated ahead, and alleging settlement as of September 4th, and left these papers with the Register of the Land Office to be filed on that day. They then procured timber and teams, and started for the lands, arriving there at sunrise, and commenced to build houses before twelve o'clock noon. The General Land Office, in successive decisions of March, 1876, and June, 1877, held that these filings were valid. Secretary Schurz, in an elaborate opinion, reverses both of these decisions. He holds that the declaratory statements were executed before settlement, and at a time when the land was in a state of reservation; that the executive order of restoration prohibited the local office from allowing any filings or entries prior to the day of restoration, and that its action in receiving declaratory statements prior to that time, and afterward placing them on record, was contrary not only to the spirit and intent of his instructions, but to a just and proper administration of the law of Congress. Secretary Schurz emphasizes his opinion by the following emphatic language, applicable to all registers and receivers: These officers have no authority to receive applications to file or enter lands which are in a state of reservation, and to hold such filings until the reservation is removed, and then place them on record, in order to advance the interests of any individual. Such an act of favoritism is contrary to a proper administration of the public land system, and cannot receive the sanction of this Department. These filings must therefore be canceled. The Secretary then proceeded to discuss the conflicting claims of various other claimants, and finally awards all the land in contest in this case to Walter and O'Mara, represented before the Department by Joseph Towson of Washington.

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No. 6.

Legal Notes.

ADMITTED TO PRACTICE.—Chas. B. Fitzpatrick was admitted on April 25, to practice in the Supreme Court, on motion of D. W. Welty, and license from the Supreme Court of Arkansas. And on April 30th, Peter S. Wilkes of Stockton, on motion of Matt F. Johnson, and license from the Supreme Court of Missouri;—and William Allen Johnson, also on motion of Matt F. Johnson, and license from Supreme Court of Michigan.

REHEARING GRANTED.—On April 29th and 30th, the Supreme Court decided to grant a rehearing in the case of *Hagitt vs. Spect.*,—reported in RECORD of March 30th,—and, of *Snow vs. Kinsler*, and *Dowd vs. Clark*, reported in RECORD of April 6th;—and of *Zeinwaldt vs. Sac. City Railway Co.*, reported in RECORD of April 13th;—and also of *Winter vs. Belmont Mining Co.* In *Dowd vs. Clark* the rehearing will be confined to the question as to the interest since the tender.

WORK AHEAD.—Our Supreme Court has been working so rapidly and efficiently during the April term at Sacramento, that we have been obliged, not only to omit for the present the publication of all foreign decisions—including an important one on file from the U. S. Circuit of Oregon, involving the landed rights of British subjects under the treaty of '46;—but are under the necessity of deferring for *one more week* the very interesting opinion on the "Mahoney Mining Co. vs. Samuel Bennett," by Judge Sawyer of our own U. S. Circuit; also several important *land decisions*. And we still have on file, for the earliest possible publication, 21 written opinions, and 56 unwritten decisions of our Supreme Court, which we hope to achieve in two or three more issues. We vote for the Court vacation which continues two months; the next term to commence in San Francisco on July 8th.

Supreme Court of California.

[April Term, 1878.]

[No. 5425.]

[Filed April 18, 1878.]

DYER vs. BARSTOW.

Appeal from Third District Court, San Francisco, S. B.
McKEE, Judge.

**STREET ASSESSMENT—CONTRACT FOR GRADING—ACT OF APRIL 4, 1870 CON-
STRUED.**—The contract being made *before* the act, and the assessment
after,—could the contractor, or the city, maintain an action.—*Held*, that
sec. 13 of said Act provides that the Act shall not be construed as "ap-
plicable" to previous contracts or the remedies for their enforcement—
hence the contractor might maintain action as though the Act of 1870
had never passed.

STATEMENT OF FACTS.

Action commenced December 2, 1875, by James S. Dyer, to recover \$5,191.-
69 due on delinquent assessments for grading Vallejo street, from Webster to
Piarce,—case tried without jury August 28, 1876, and judgment for plaintiff,
for \$8,825.86 principal and interest, to be apportioned among the defendants,
George Barstow and others, in proportion to original indebtedness. Bill of ex-
ceptions filed, and appeal taken by defendants, December 2, 1876.

J. C. Bates, attorney for plaintiff and respondent.

M. A. Edmonds, attorney for defendant and appellant.

The other necessary facts appear in the opinion.

OPINION BY THE COURT.

Dyer vs. Pixley, 44 *Cal.*, 158, was an action by the contrac-
tor to recover a street assessment, under a contract entered
into in the year 1869, the diagram, assessment and warrant
having been issued and recorded in July, 1870. The facts
were precisely analagous to those involved in the present
case, which is also an action by the contractor founded on a
contract made in 1869, the diagram, assessment and warrant
having been issued in November, 1870. In each case the con-
tract was made before and the assessment after the passage of
the act of April 4, 1870 (*Statute* 1869-70, p. 890). In the
former case the point was made that the assessment having
been made and issued *after* the passage of the act of 1870, the
action could not be maintained by the contractor, but only by
the city and county of San Francisco, as authorized by that
act. But the thirteenth section of the act provides that the

act shall not be construed so as to "affect any contracts heretofore awarded or assessments issued." In construing this clause we held its correct interpretation to be that the act should not be construed as "applicable" to previous contracts, or the remedies for their enforcement, and consequently that the contractor might maintain the action as though the act of 1870 had never passed. We see no reason to doubt the correctness of this ruling and we think it is decisive of the present action.

Judgment affirmed. Remittitur forthwith.

[No. 5889.]

[Filed April 19, 1878.]

WANZER vs. SOMERS.

An appeal from Seventeenth District Court, Los Angeles Co.,
SEPULVEDA, Judge.

LIEU LANDS—CONTESTED PURCHASE—The defendant's application, when filed on June 12th, 1868, was defective from repeal of act under which it was commenced. But, the Legislative Act of 1870 intervened before filing of application of plaintiff, in 1875,—hence, *Held* that the curative statute of March 24th, 1870 made the defendant's application valid—however defective—and he was therefore entitled to purchase the land from the State.

STATEMENT OF FACTS.

This action arises from a contest in the State Surveyor General's office, on application to purchase certain Lieu Lands in Los Angeles County.—W. F. Somers, defendant, made application March 30, 1868, to the State Locating Agent for the land, under Act of April 27, 1863, by affidavit, supported by those of three witnesses—which was accepted April 20, on condition of approval by the U. S., and the papers were filed with the State Surveyor General on June 12, 1868. The land was transferred to the State December 1, 1871—the defendant's location was approved by the Surveyor General January 21, 1873, and he made the twenty per cent. payment of purchase money to the County Treasurer, and received certificate of purchase March 14, 1873,—and on March 15, 1875 paid in full, and applied for a patent. And now, on December 21, 1875 Jas. O. Wanzer, plaintiff, made application, for same land,—paid the proper fees, and the Surveyor General received and filed same in his office,—and on December 22, protested against the issuance of patent to Somers—and demanded a hearing before the proper tribunal. Whereupon the Surveyor General on May 3, 1876, referred it to the Seventeenth District Court, where it was tried May 21, 1877 upon the following issue:—On May 28, 1868, about one month after the acceptance of Somers' application,—and before the filing with the Surveyor General,—a change was made in the management

of the State Lands by the Locating Agents, by repeal of the acts of 1856 and 1863; and under the new provision of March 28, 1868, taking effect May 28,—Somers' original papers became insufficient—although his subsequent proceedings appeared to be correct. Judgment was rendered for plaintiff, declaring defendant's application void, and decreeing the cancellation of certificates of purchase and authorizing the purchase of the land by Wanzer. From this defendant appealed, October 13, 1877, claiming relief under the act of March 27, 1872, and the legalizing act of March 24, 1870. Wanzer's application was not made until after both acts had taken effect.

Blanchard & Van Fleet and *Howard & Hazard*, attorney for plaintiff and respondent.

Jno. D. Bicknell, attorney for defendant and appellant. *Thos. A. Brown*, of counsel for defendant and appellant.

OPINION BY THE COURT.

We shall assume that the acts of defendant looking toward the acquisition of title prior to June 12, 1868, when his application was filed in the Surveyor-General's office, are not to be considered as in any way strengthening his claim.

But *that* application, however defective, was made valid and effectual by the curative statute of March 24, 1870. The plaintiff's application was not filed until after the last named date. When therefore the defendant made application there were not "two or more applicants for the purchase of the same land or conflicts between claimants."

The defendant is therefore entitled to purchase the land from the State.

Judgment reversed and cause remanded with directions to the Court below to enter judgment for defendant.

[No. 5491.]

[Filed April 20, 1878.]

SHAFTER vs. EVANS.

Appeal from Seventh District Court, Marin County.

JACKSON TEMPLE, Judge.

NEGLECT—EVIDENCE OF.—When *circumstances* tending to show negligence are *proved*, the *fact* of negligence must be *inferred* from those circumstances, by the jury. It is not to be established by the mere opinion of witnesses; nor by experts. Hence, *Held*, that the evidence of the witnesses testifying to their opinion of the safety of the corral was inadmissible, and should have been excluded.

STATEMENT OF FACTS.

The plaintiff James McM'Shafter, and one Howard, for whom defendant William Evans, was acting as agent, owned adjoining lands at Baulinas on the ocean shore.

Defendant had a corral on the ocean bluff, fenced on the other three sides but not on the bluff, which was 50 feet high, and nearly perpendicular. Into this corral, defendant drove 250 certain cattle to separate, and among them 35 head of plaintiff's young cattle, which had got through the defective fence; and they were left in over night, without a watch—after notifying defendant of the fact. In the morning 29 of the 35 were found killed, and ruined, by going over the bluff, for which plaintiff brings suit for \$725. Tried by jury, and verdict for defendant for his costs, \$97.75. Motion by plaintiff for new trial on full statement and argument, but over-ruled. Plaintiff appeals December 1st, 1876, from judgment and order. The law points in contest, appear further in the opinion.

Jas. McM'Shafter, attorney for plaintiff and appellant.

T. H. Hanson, for defendant and respondent.

OPINION BY THE COURT.

The ultimate question in issue at the trial was whether it was an actionable negligence in the testator of these respondents to cause the cattle of the plaintiff to be driven into the corral, under the *circumstances* alleged. When those circumstances were established by proof, the ultimate fact of negligence on the one hand, or ordinary care upon the other, was a matter to be *inferred* by the jury. The ultimate fact of negligence in such a case, is not one to be established by the mere opinion of witnesses called to testify. The evidence of experts is not admissible. A clear expression of this principle is found in *New England Glass Company vs. Lovell*, 7 *Cush. R.* 321, where Chief Justice Shaw observes as follows: "In applying circumstantial evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform: First, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidences of opinion; it is for the jury to draw the inference."

These views were subsequently adopted and applied in the case of *White vs. Ballou*, 8 *Allen R.*, 408, where the general question was one of negligence in kindling a fire under certain circumstances appearing in proof.

For these reasons we are of opinion that the evidence of the witness Parsons and others, testifying to their opinion of the safety of the corral, was inadmissible, and should have been excluded.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 5561.]

[Filed April 20, 1878.]

AMBROSE vs. McDONALD.

Appeal from Twelfth District Court, San Francisco

DAINGERFIELD Judge.

ATTORNEY-AT-LAW.—RESTRICTED AUTHORITY.—The plaintiff employed Morgan as an *Attorney* to collect the money due him from defendant, and restricted him to the bringing of suit;—hence, *Held*, that as *Attorney-at-Law* he had no authority to compromise the claim, or receive money thereon until after bringing suit.

STATEMENT OF FACTS.

Mark McDonald, defendant, as broker, bought 40 shares of stock for plaintiff Michael Ambrose, on September 28th, 1874, on which plaintiff paid \$900, down, and defendant advanced the balance, \$2,440. On October 9th, defendant sold the stock at plaintiff's request, for \$3,115, of which the \$2,440 advanced and interest and commissions, \$32, should be retained by defendant, leaving balance of \$643 and interest, for which plaintiff brings suit.

Defendant claims that on October 6th, 1874—before the said sale of the stocks—he bought for plaintiff on his order, 50 shares of other stocks, and sold same on November 30th at a loss, and that on December 1st, 1874, he had a full settlement with plaintiff by one Morgan, his attorney, and paid him a balance of \$311.63. Plaintiff denies authorizing such purchase of the 50 shares, and further, that Morgan's authority as his attorney, was restricted in writing to the bringing of suit only.

This Morgan embezzled the money, \$311.63, and fled the country.

Defendant claims he did not know of the restriction on Morgan till this suit was brought. Judgment was for defendant giving him his costs. Plaintiff's motion for new trial denied, and appeal taken on February 10th, 1877, from judgment of October 25th, 1875.

Carr & Titus, attorneys for plaintiff and appellant.

Bartlett & Pratt, attorneys for defendant and respondent.

OPINION BY THE COURT.

The Court finds that Morgan was employed by plaintiff as an *attorney* to collect the money due from defendant to him, and that plaintiff restricted his employment to the bringing of a suit against defendant to recover such money.

There is no evidence nor finding of fact that Morgan was

represented by the plaintiff as having any relation to him except as his "lawyer." As attorney at law he had no authority, actual or ostensible, to compromise the claim or receive any money thereon until after suit was brought. (*C. C. P.* 283.)

Judgment and order reversed and cause remanded for a new trial.

[No. 5902.]

[Filed April 20, 1878.]

BAGGS vs. SMITH.

Appeal from Twentieth District Court, San Benito County

D. BELDEN, Judge.

FINDINGS—AMENDMENT OF.—The Findings must respond to the material issues made by the pleadings. The findings in this case, in not so responding to the issue joined on the counter claim, of moneys loaned, are insufficient to support the judgment. The Court below has no authority to amend its findings, while appeal from its judgment is pending.

STATEMENT OF FACTS.

The plaintiffs, Isaac Baggs and E. C. Tully, attorneys-at-law, bring suit for \$1,200, claimed to be due by defendant, Charles Smith, for professional services, between February 1st, 1874 and September 1st, 1875, in settlement of estate of Andrew G. Smith, deceased, of which the defendant was the only heir. Defendant brings cross-complaint that Baggs agreed to do certain services for \$3 per day, and for a contingent fee of \$100, for which he was paid \$25, and the \$100 in full; also a counter claim for \$75, lent plaintiff and not paid. Case was tried without jury, by consent, and Court found for plaintiff \$400, and costs \$31.85. Entered June 4th, 1877. Defendant appeals from the judgment, June 23, 1877. Afterwards on August 6th, 1877, on motion of plaintiffs, the Court amends the findings, making the \$75 as payment for services, and leaving the \$400 still to stand over and above. Defendant also appealed from this order on September 25th, 1877, and claims that pending the appeal the Court lost jurisdiction of the case, and could not so amend.

Drake & Rix, attorney for plaintiffs.—*James N. Breen*, for respondents.

A. Craig, attorney for defendant.—*Wm. Leviston*, for appellant.

OPINION BY THE COURT.

The findings filed June 4, 1877, are insufficient to support the judgment entered on that day, in that they did not respond to the issue joined upon the counter claim of the defendant for the alleged loan of moneys to the plaintiffs. It is the settled rule that the material issues made by the pleadings must be responded to by the findings.

The order of August 6, 1877, amending the findings was also erroneous, if for no other, for the reason that the cause was then pending in this Court upon appeal from the judgment, and under such circumstances the Court below had no authority to make new or further findings in the cause.

Judgment and order of August 6, 1877, reversed, and cause remanded for a new trial.

[No. 5249.]

[Filed April 22, 1878.]

MCDONALD vs. HASELTINE.

Appeal from Twelfth District Court, San Francisco County.
DAINGERFIELD, Judge.

NEGLIGENCE—DAMAGES—A common employer of several persons, to perform the same general duties, is not bound to respond in damages for the injury of one, by reason of the negligence of another, in the absence of evidence of his neglect to use ordinary care in the selection of such employee, as properly qualified for such duties.

STATEMENT OF FACTS.

The plaintiff, Edward McDonald, was hired as a longshoreman by defendant, Charles E. Haseltine, a stevedore, to help load the ship "Western Shore," with wheat, alongside the North Point Dock. While so loading, a sack of wheat came down the chute and over, so as to knock down the plaintiff and break his leg, by compound fracture, and other injuries, so he was confined six weeks, and not able to walk for three months—caused large expense for medicine, etc., \$100; doctor's fees, \$200; loss of time, at \$125 a month, \$1,100; and personal damages, \$10,000, for which he brought suit. Defendant denies any negligence on his part, alleging that plaintiff and his co-employees could and did arrange the chute, etc., as they wished—without any interference on his part. Was tried by jury, and a verdict for plaintiff for \$700 and costs, \$140.25, and judgment entered January 19th, 1876. Motion for new trial denied, and appeal taken by defendant May 29th, 1876, from the judgment and order, defendant claiming that plaintiff had been guilty of contributory negligence, if any blame could attach.

McAllister & Bergin, attorneys for plaintiff and respondent.

Sidney V. Smith & Son, for defendant and appellant.

OPINION BY THE COURT.

Chase was a person employed by defendant in the same general business as plaintiff.

The common employer was not bound to respond in dam-

ages for any injury occurring to plaintiff by reason of the negligence of Chase, in the absence of evidence that he had neglected to use ordinary care in the selection of Chase, as a person properly qualified to discharge the duties imposed upon him, (*Civil Code*, 1970; *McLean vs. Blue Point M. Co.*, 51 *Cal.*, 255; *Collier vs. Steinhard*, *Id.*, 116.

Judgment and order reversed and cause remanded for a new trial.

[No. 5606.]

[Filed April 22, 1878.]

CHRISTIE vs. CHRISTIE.

Appeal from Ninth District Court, Siskiyou County,

A. M. ROSEBOBOUGH, Judge.

DIVORCE—INSUFFICIENT GROUNDS.—The complaint alleges three grounds for a divorce,—which are denied by the answer. Cause being tried, with no evidence being offered by the defendant, and all the issues found for the plaintiff,—*Held*, that the evidence as recorded, fails to establish either ground for a divorce.

STATEMENT OF FACTS.

This is an action for divorce—brought by the plaintiff, Eleanor A. Christie, against defendant, John Christie, on the three grounds of *desertion*, *cruelty* and *neglect*. The marriage took place in Idaho City, October 23d, 1864,—desertion charged in 1872, and on August 5th, 1876, defendant took the three children from plaintiff, away to Oregon. Has not provided for her support for over three years, and is worth over \$2,000 of community property. Prays for a divorce, and custody of the three children, and allowance for support, etc. Defendant denies desertion, or cruelty and neglect, and shows the furnishing of money for her and the children from time to time. Cause tried February 7th, 1877. Defendant moved for non-suit—overruled—case was submitted after testimony on part of plaintiff—without argument, and decree entered for plaintiff. Defendant appealed from the order, and from the final decision on March 13th, 1878.

E. Steele, attorney for plaintiff and respondent.

C. Edgerton and *J. L. Murphy*, for defendant and appellant.

OPINION BY THE COURT.

The complaint for a divorce proceeds upon three grounds: First, wilful desertion; second, extreme cruelty; third, wilful neglect. The allegations of the complaint are denied by the answer. The cause was tried before the Court. No evidence was offered by the defendant. The Court below found all the issues for the plaintiff.

We have carefully examined the evidence sent up in the record, and we think that it utterly fails to establish either of the grounds set forth in the complaint as grounds of divorce.

The appeal from the order overruling the motion for a nonsuit is dismissed, the judgment is reversed, and the cause remanded.

[No. 5687.]

[Filed April 22, 1878.]

LIVINGSTON vs. MORGAN.

Appeal from the 15th District Court—Contra Costa County—

DWINELLE, Judge.

TRESPASS—JURISDICTION.—The possession of the *land* by the plaintiff being a fact when the trespass was committed, an averment by him of the *ownership* of the *fences* adds nothing to the complaint or cause of action. (See *Pollock vs. Cummins*, 38 Cal. 683.) *Held*, that the Justice had jurisdiction of the case before its transfer to the District Court. The judgment for "*gold coin*," cannot be supported in this case.

STATEMENT OF FACTS.

This action first brought in the Justice's Court for Second Township, Contra Costa County,—before John Slitz, Esq., J. P.,—to recover certain fence, alleged to have been broken into and taken by defendant, Wm. Morgan, away from upon the land of which plaintiff, Jno. H. Livingston was in possession and occupancy on May 1st, 1875, of which fence he claimed to be the owner—leaving his crops of wheat and barley exposed to ruin by stock, obliging him to guard same for two months, etc.; and he claims damages \$299.99, and costs.—Defendant demurred that Court had no jurisdiction,—and for answer, denies everything, and alleges that it involves title to real estate; and plaintiff, not the *only* occupant of the land—two others also on it,—and should have been joined in the action.—Demands that proceedings be suspended, and cause certified to District Court.—Cause was so transferred by order, May 8th, 1876—to 15th District—filed June 22nd, 1876—for April term.—The demurrer overruled, and trial held April 18th, 1877, jury being waived,—and judgment for plaintiffs for \$117.61, and costs, \$103.10.—Defendant appeals, May 14th, 1877, and makes point of non-jurisdiction, and judgment should not be in "*Gold Coin*."—Respondent claims that amount of damages claimed being less than \$300, District Court has no jurisdiction,—and appeal should have been from Justice's Court to County Court.

Mills & Jones, attorneys for plaintiff and respondent.

Eli R. Chase, for defendant and appellant.

OPINION BY THE COURT.

The only respect in which this case is claimed by appellant to differ from that of *Pollock vs. Cummins*, 38 Cal. R., 683, is

in the fact that the complaint here alleges that the plaintiff was the *owner* of the fences standing upon the land mentioned therein. But this averment added nothing to the complaint or to the cause of action therein set forth, and the gravamen of which was the fact of possession of the land by the plaintiff when the alleged trespasses were committed by the defendant.

The averment as to ownership of fences might be stricken out, and the cause of action and proof which might have been adduced in its support, would be precisely the same.

We think, therefore, upon the views stated in the case referred to, the Justice must be held to have had jurisdiction of the action before its transfer to the Court below.

2. But the judgment for *gold coin* cannot be supported, and it must be modified accordingly.

The judgment of the Court below is therefore modified by striking therefrom the words "*in gold coin of the United States,*" and the cause remanded with directions to make such modification; the appellant not to recover of the respondent any costs occasioned by this appeal.

[No. 5183.]

[Filed April 20, 1878.]

JOHNSON vs. SQUIRES.

Appeal from Seventh District Court,—Solano County,—WM.

C. WALLACE, Judge.

FINDINGS—WHEN INSUFFICIENT.—When a finding embraces several issues of fact or pleadings, it becomes indefinite and insufficient, as a finding of fact.

STATEMENT OF FACTS.

This was an action brought to quiet title to certain land in Solano County, on the Sacramento River, in Rio Vista Township. Plaintiffs, James Johnson and T. P. Emigh, claim the title in fee to two acres of land, in which defendant, Wm. K. Squires claims an adverse interest—by having contracted with Geo. H. Jenkins in August, 1868, the then owner, for an undivided half of an acre of said land—for \$50, and to have paid the same by the erection of buildings, in company with said Jenkins, and paying for all the materials, etc. Defendant retained possession till 1872, when plaintiffs broke into his buildings, and took forcible possession, and of personal goods. Plaintiffs title admitted to be in regular succession, but obtained after full notice of the contract and occupancy of defendant.—Trial held May 18th, 1878;—among the findings—4th, that the "defendant has no claim whatever," etc.—5th, "that all the issues of fact

raised by the pleadings in this case, are hereby found and decided in favor of the plaintiffs, and against said defendant." Judgment for plaintiffs and costs, \$52.35 on May 21, 1875. Motion by defendant for a new trial, with much testimony, but overruled.—Appeal taken from judgment and order, November 10, 1875. Defendant claims, as he paid for all the lumber in the buildings, and for the most of the work, he could compel specific performance of the contract, etc.

Wm. S. Wells, attorneys for plaintiffs and respondents.

M. A. Wheaton and *J. McKenna*, for defendant and appellant.

OPINION BY THE COURT.

The answer of defendant Squires set up an affirmative defense, upon which, if proven, he would be entitled to a decree in his favor.

The findings of fact do not, in terms, dispose of the issues tendered by this affirmative defense, and they remain undisposed of unless by the *fifth* finding. This finding is as follows: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the plaintiffs and against said defendant." We do not think this finding sufficient. To say that all the issues of fact raised by the pleadings are found and decided in favor of either party, suggests an inquiry as to what issues are raised by the pleadings—a question often found to be one of no little difficulty to determine, and concerning which, in this case, the views of the Court below may be widely different from our own.

We think the finding under consideration as indefinite in its character as the finding that "all the material allegations of the complaint" are resolved in favor of a named one or other of the parties, and which we have held insufficient as a finding of fact.

Judgment and order denying new trial reversed and cause remanded for a new trial. Remittitur forthwith.

IMPORTANT CASES DECIDED.—The noted mining-debris test case of *Atkinson vs. The Amador and Sac. Canal Co.*, decided April 30th; and of *People vs. Royal*, of Santa Rosa; and of *Oakley vs. Stuart* of our city—all deferred for want of space,—we hope to report fully in our next issue.

Supreme Court Unwritten Opinions.

[No. 5,714.—Decided April 18, 1878.]

MATTER OF THE ESTATE OF KEENAN.

Appeal from Probate Court of Placer County.

PROBATE JURISDICTION:**STATEMENT OF THE CASE.**

This is the same case materially as *Wetzlar vs. Fitch*, filed April 4, reported in RECORD No. 3, page 46. Wetzlar presents to the Probate Court the account of the estate of Jno. C. Keenan, deceased, of \$9,481.93 as due from the estate of Rosanna H. Keenan of which he (Jno. C.) was executor. The Court refused to set the account for hearing, on the ground that more than ten months had elapsed from the publication of notice to creditors,—and further, that Wetzlar, as executor of Jno. C. Keenan's estate had no authority to act for the estate of R. H. Keenan. Appeal by Wetzlar from the order denying motion for new trial, and also from the order of distribution previously entered, and from the order refusing to set the account for hearing. Orders now affirmed.

Geo. Cadwalader, attorney for appellant.

McKune & Welty and *Armstrong & Hinkson*, attorney for respondent.

[No. 5426.—Decided April 18, 1878.]

DYER vs. BRANDENSTEIN.

Appeal from the Fifteenth District Court, San Francisco,
DWINELLE, Judge.

STREET ASSESSMENT.**STATEMENT OF THE CASE.**

This is an action brought by Jas. S. Dyer, plaintiff, on a delinquent street assessment in San Francisco,—in which he obtained judgment. The appeal is taken by defendants, Joseph Brandenstein, Moses Rosenbaum et al, directly from the judgment. Judgment obtained was for \$6,704.80 and interest \$4,559.26, and costs \$249.10, for grading done on Vallejo street, from Webster to Pierce. The first proceedings by Board of Supervisors was by a resolution of intention, on July 12, 1869, which was followed on July 26 by a resolution of the Board ordering the work to be done and directing the clerk to adver-

tise for sealed proposals. But it is claimed that the Board never authorized any notice *inviting* sealed proposals, hence no lien could be created, and therefore the judgment was without authority of law. The judgment by District Court was on August 4, 1876.—Appeal taken November 24, 1876. That judgment now affirmed. Remittitur forthwith.

Jarboe & Harrison, attorneys for defendants and appellant.
J. M. Wood, attorney for plaintiff and respondent.

[No. 5927.—Decided April 19, 1878.]

CLARK vs. TECOPAH SILVER MINING CO.

Appeal from Eighteenth District Court, San Bernardino Co.,
 W. T. McNEALY, Judge.

DEFAULT OF NOTICE.

Horace Clark, plaintiff, brought action July 21st, 1877, to recover \$3,972.14 for work done for defendant. Tried, by jury, October 3d, and verdict for plaintiff. Judgment for \$3,512.14 entered, October 4, 1877. Stay of execution for 20 days granted, that defendant might serve statement on motion for new trial. Said *statement* filed October 24th. Motion was denied on ground that the *notice* of the motion (served October 19th) was too late,—should have been within ten days from entry of judgment—the 20 days *stay of execution* not referring to the *notice*. Defendants appealed from the judgment and order on November 13, 1877. Judgment and order now affirmed. Remittitur to issue forthwith.

C. W. C. Rowell, attorney for plaintiff and respondent.
A. C. Lawrence and J. W. North, attorney for defendant and appellant.

[No. 5856.—Decided April 19th, 1878.]

ST. JOHN vs. MEYERSTEIN & CO.

Appeal from Eighteenth District Court, San Bernardino County.

W. T. McNEALY, Judge.

BREACH OF CONTRACT.

Action commenced September 4th, 1876, by Stephen W. St. John, plaintiff, for a breach of contract against C. Meyerstein, who had agreed on October 15th, 1874, to furnish plaintiff freight and hauling for one year, for a ten-horse team, from Spadra, Los Angeles county, to Panamint, Inyo county, at a stipulated price.

Plaintiff accepted, and commenced work at once, and freight was furnished him till May 15th, 1875, when they failed to furnish further, and defendant was thrown out of employment.

Plaintiff was dealing with defendants, buying goods out of their store for his family use until March 2nd, 1876, when he gave them his note for \$135.37, balance of said store account, which he subsequently paid.

Defendants claimed that *all matters* of difference were settled by the note; but plaintiff claimed that it had nothing to do with the freighting, and claimed \$2,600.00 for the whole year. Case tried without jury, and judgment for plaintiff for \$1,742.00. Defendants claimed that the contract, being for a whole year, and not being in writing, was void, for not being performed *within* a year. Appeal taken June 18th, 1877. Judgment now affirmed. Remittitur forthwith.

J. W. Satterwhite and *H. C. Rolfe*, attorneys for defendants and appellant.
C. W. C. Rowell, for plaintiff and respondent.

[No. 5705.—Decided April 19, 1878.]

BEAUDRY vs. LOS ANGELES.

Appeal from Seventeenth District Court, Los Angeles County.

SEPULVEDA, Judge.

STREET ASSESSMENT.

Action, in *tort*, was brought by Prudent Beaudry, plaintiff, to recover \$911.20 paid to the city tax collector under protest, as an assessment for improvements on Alameda street in the city of Los Angeles; on the ground that the City Council improperly accepted the work, to pay for which the assessment was made.

Before its acceptance the plaintiff objected that the specifications of the contract had not been complied with. But the proceedings otherwise being regular, a deduction was made by the City Council against the contractor. Subsequently the plaintiff was compelled to pay an additional \$52.50, (also under protest), for improving the street intersection, which was added by amendment to the complaint.

Judgment was rendered for plaintiff for the last named amount, \$52.50; subsequently it was modified by allowing plaintiff costs in the action. But plaintiff appealed on December 5th, 1877. Judgment now affirmed. WALLACE, C. J. expressing no opinion.

Howard, Brouseau & Howard, attorneys for plaintiff and appellant.
J. F. Godfrey for defendant and respondent.

Recent U. S. Land Decisions.

Case of John T. Farley.

HOMESTEAD ENTRY—PERSONAL ATTENDANCE.—In the Act of March 3d, 1877, —authorizing the pre-emptor to change his filing to a Homestead entry, with credit for the time he has resided on the land claimed—there is nothing which requires his *personal* attendance at the local office.

DEPARTMENT OF THE INTERIOR, }
WASHINGTON, D. C., March 13th, 1878. }

To the Commissioner of the General Land Office—SIR: I have considered the appeal of John T. Farley, from your decision of November 19th, 1877, rejecting his application to change his pre-emption filing to a Homestead Entry, under the Act of Congress approved March 3, 1877, entitled, "An

act for the relief of settlers on the public lands under the pre-emption laws." (19 Statutes, p. 404.)

The facts in this case are substantially these: John T. Farley filed D. S. 649 at Los Angeles, California, for the S. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Section 2, Township 19 S Range 2 W., on June 12, 1874, alleging settlement January 25th of the same year. He subsequently abandoned the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of said Section 2, and his filing for that tract was canceled by your office October 7, 1875.

On October 30th, 1877, Mr. Farley made application to change his filing for the other tracts to a homestead entry, under the provisions of the act of Congress approved March 3, 1877, which authorizes such change, and allows the settler credit on his homestead claim for the time he has occupied the land under the pre-emption laws. (19 Statutes, 404.) It appears that Mr. Farley made proof of his compliance with the requirements of the pre-emption laws, which was submitted with said application.

The local officers rejected said application because Mr. Farley did not appear in person with his witnesses at their office, and make proof of his compliance with the pre-emption laws, basing their action on the instructions contained in your circular of April 4th, 1877. On appeal you held that the applicant must appear in person at the local office, but that the testimony of his witnesses might be taken before a judge or clerk. I do not think your ruling is warranted by a fair construction of the law governing this case. There is nothing in the law authorizing the pre-emptor to change his filing to a homestead entry which requires his personal attendance at the local office; and in the absence of such a requirement, it is reasonable to suppose that Congress intended that the provisions of the homestead law relative to entry and final proof should be followed in cases arising under this act. Section 2294 of the Revised Statutes authorizes the applicant for the benefit of the homestead law to make the affidavit required by Section 2290 of the Revised Statutes, before the clerk of the court of the county in which he resides, in cases where he is "prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land-office." The act approved March 3d, 1877, entitled "An act to amend Section 2291 of the Revised Statutes of the United States in relation to proof required in homestead entries," [19 Statutes, 403] authorizes the settler to make his final homestead proof before the Judge, or in his absence, the Clerk of

any Court of Record, of the County and State, or District and Territory, in which the land is situated.

It will be seen that personal attendance is not absolutely required in making a homestead entry, and is wholly dispensed with in making the final proof thereon, and as the law authorizing transmutation does not require it, I can see no good reason why it should be exacted in cases where good cause is shown for non-attendance. The claimant must show a *bona fide* residence on the land and full compliance with the law when he makes his final proof, and I am of opinion that this interlocutory proof should be dispensed with, and in lieu thereof, the homestead affidavit should be so amended as to set forth the fact of a previous pre-emption filing, the time of actual residence thereunder, and the intention of the party to claim the benefit of such time on his homestead entry, under the act of March 3, 1877.

You will allow Mr. Farley to enter the land in question, after amending his homestead affidavit in the manner above stated. Your decision is reversed, and the papers transmitted with your letter of December 22d, 1877, are herewith returned.

Very Respectfully,

C. SCHURZ, Secretary.

—Copp's Land Owner for April.

Nevada Supreme Court Decision.

Duncan S. Thomas, Appellant, vs. J. D. Sullivan, Max Oberfelder and M. Harrison, Respondents.

ATTACHMENT. FRAUDULENT TRANSFER.—

[Opinion by LEONARD, J.]

In July 1874, and prior thereto, William Jones and W. L. Kimerly were co-partners in coal and wood business in Eureka County. They had formerly owned two wood ranches, but on the 28th day of July, 1874, they had but one, which was known as the "Gunn ranch." They owned teams which were required in carrying on their business. At the time of the sale of the property to plaintiff, hereinafter mentioned, Jones and Kimerly, as co-partners, were indebted to different parties, among whom were defendants Oberfelder and Harrison, whose claim was \$2,238.94, for goods sold and delivered to Jones & Kimerly. On the 3d of August, 1874, Oberfelder and Harrison brought suit against Jones & Kimerly to recover the amount of their claim, and attached the property described in the complaint herein. Defendant Sullivan, as Sheriff of Eureka County, served the writ by taking the property into his possession. Oberfelder and Harrison obtained judgment for the full amount of

their claim, and this action was brought to recover of defendants the value of the property attached and taken by them, stated to be \$1,600. Defendants, in their answer, admitted taking the property described, but justified the same by alleging that it was at the time of the attachment, the property of Jones & Kimerly; that plaintiff's claim thereto was fraudulent; that if any transfer of said property was ever made, such transfer was for the purpose of hindering, delaying and defrauding the creditors of Jones & Kimerly, and particularly Oberfelder & Harrison, defendants herein, and that such transfer was without consideration and void. A jury trial was had and plaintiff obtained judgment against defendants for the alleged value of the property attached, \$1,600. Defendants moved for a new trial on the grounds that the jury gave excessive damages; that the verdict was against law; that errors in law occurred at the trial, and that the evidence did not justify the verdict. The motion was granted by the court upon the last ground stated, and this appeal is taken from the order granting a new trial.

The record does not disclose wherein the evidence was regarded as insufficient by the court, nor has counsel for respondent, in his brief, directed our attention to any particular wherein it was insufficient. The statement is incomplete, and the result is that the most important questions touching the merits of the case cannot be decided.

Counsel for appellant urges us to disregard the statement on motion for a new trial so far as it relates to the assignment that the evidence does not justify the verdict, on the ground that there are no sufficient specifications of particulars wherein the evidence is alleged to be insufficient. As to some of them, we think the criticism of counsel is just; but the last is full and explicit. It is "that no change of possession of property on the ranch was shown."

At the trial plaintiff claimed and introduced evidence tending to prove, that on the 28th day of July, 1874, Kimerly, on behalf of Jones & Kimerly, sold and delivered to him the personal property described in the complaint, and also the said "Gunn ranch;" that a portion of said personal property was at the time upon the ranch, and consisted of wood, coal and coal sacks; that the consideration of the sale was two promissory notes, signed by him and made payable on demand to Kimerly alone; plaintiff and Jones testified to the fact that Kimerly was authorized by Jones to sell the property; also that subsequent to the sale and before the attachment Jones notified the acts of Kimerly; but upon the questions of previous authority and subsequent notification defendants proved the testimony of Jones given under oath before Judge McKenny, subsequent to the attachment, which tended to show that the sale by Kimerly was unauthorized by Jones, and that the latter did not notify the acts of the former before the attachment.

Plaintiff testified that Kimerly delivered to him a bill of sale of the personal property on the ranch, and of the ranch itself, but the record contains no transcript of the same.

Upon the question of the delivery of the property on the ranch, plaintiff testified that on the 28th day of July, 1874, Kimerly delivered to him the ranch and the wood, coal and coal sacks thereon; that he stopped on the ranch two or three days; that he asked Gunn, who had been burning coal for Jones & Kimer-

ley, for seventeen and one-half cents a bushel, to continue burning for him upon the same terms, and that Gunn agreed to burn for him as he had been doing for Jones & Kimerley; that he then went to Sulphur, where he had left the team; stayed there all night; went to the ranch, loaded with coal and went to Eureka, where the Sheriff attached the wagon and coal therein, on the 3d day of August; that the Sheriff attached the cattle, seven head, on the 5th day of August; the balance of the coal, a portion of the coal sacks and all the wood were attached on the ranch. Plaintiff testified that he was to pay the notes by hauling coal, and was to have time to do so. It does not appear that he gave any security for their payment. He had due him \$600; owned horse, saddle and bridle, and two coal ranches, the value of which is not stated. He did not assume any debts of Jones & Kimerley; did not know whether Jones & Kimerley owed Oberfelder & Harrison anything or not; knew that the latter had furnished the former with goods, but was not certain that there was any indebtedness by reason thereof; made no inquiries as to what Jones & Kimerley owed; thought it was none of his business. Jones testified that the property Kimerley sold to plaintiff was all the property that the firm had left; that the reason why the sale was made was because Kimerley said Oberfelder & Harrison would close down on them; that they wanted their men to get their pay; that he and Kimerley had a quarrel and concluded to close out. He also stated that neither he nor Kimerley was on the ranch after the sale; but it does not appear that either of the partners was on the ranch at any time before the sale, or that any one remained there except Gunn, who still remained in the employ of plaintiff as he had previously done for Jones & Kimerley.

Aside from a conveyance and delivery of the ranch by Kimerley, the only evidence before us of a continued change of possession of the personal property attached thereon, is this: Plaintiff stopped on the ranch two or three days. But so did Gunn, as he had formerly done; and there is no proof that plaintiff exercised any acts of ownership over the ranch or personal property thereon during the two or three days he was there; and during the whole time before the attachment, the only act performed by him that indicated a claim of ownership or possession, so far as the record shows, was loading up a certain amount of coal after getting the team from Sulphur, and taking it to Eureka. We do not think this proof was sufficient as against creditors of Jones & Kimerley, to satisfy the Statute of Frauds. But aside from the fact that a bill of sale, signed by Kimerley alone, purporting to convey the ranch and the personal property thereon, was admitted in evidence against defendant's objection, the testimony above stated is all the proof given to establish a delivery and continued change of possession of such property. The bill of sale is not before us, and consequently we cannot know that it was such an instrument in writing as the statute requires as a conveyance of an interest in lands. We do not know whether the whole title of Jones & Kimerley, or Kimerley's alone, or of neither, was conveyed thereby.

Without previous authority or subsequent notification before the attachment, Kimerley could not sell or convey Jones' half interest in the ranch, although it be true that the bill of sale was sufficient in form and substance on its face to convey the whole title; and upon the question of such

authority and ratification, we have seen there was great conflict of testimony. But whatever the real facts may be as to the conveyance of the ranch, as before intimated, the case, as presented on this appeal, is the same as though there had been no attempted sale of the real property. However, the order granting a new trial must be sustained for another reason. At the trial defendants requested the court to instruct the jury as follows:

"In making up your minds on the validity of the sale claimed by plaintiff, you should take into consideration all the circumstances surrounding the same; the situation of the parties; the solvency or insolvency of Jones and Kimerly; whether Thomas was acquainted with their circumstances or believed or had reason to believe them in debt; the character of the notes given; that they were payable only to one of a firm; whether the trade was within the legitimate business of the partnership business, and the action of the parties; and if, from all you believe, the sale was not in good faith, and for a valuable consideration, you will find a verdict for defendant." The refusal of the Court to give this instruction is assigned as error. The intent of parties to a sale can never be ascertained except by a consideration of all facts attending it. If their intent was fraudulent the sale is void, although a full price was paid by the vendee. (Bump on Fraud Conveyances, 231.) No witness can look into the minds of the parties and thus be able to swear positively that they intended to defraud the creditors of the vendor; and hence, fraud can generally be shown only by facts and circumstances which tend directly or indirectly to establish it. No one act or declaration may establish it, but the whole, when considered in the light of surrounding circumstances, may show it to the satisfaction of court and jury. "These acts and declarations, and all concomitant circumstances, must be established, and then the motion may be deduced from them in accordance with those principles which are shown by experience and observation to rule human conduct. The proof in each case will consequently depend upon its own circumstances. It usually consists of many items of evidence, which, standing detached and alone, would be immaterial, but which, in connection with others, tend to illustrate and shed light upon the character of the transaction, and show the position in which the parties stand and their motives, conduct and relation to each other." (Bump 560.) There was no fact or circumstance mentioned in that instruction which should not have been "taken into consideration" by the jury. There was no fact or circumstance legitimately developed at the trial that should not have been taken into consideration by them in deciding upon the question of the intent of both parties to the sale. This instruction would have directed the jury, among other things, to take into consideration the fact that the notes given by plaintiff were payable to Kimerley alone. This, at first blush, may seem to take from the jury the consideration of the question whether the notes were or were not so payable. But that fact was conceded by plaintiff. In fact he so testified. So upon this point, there was no question of fact to go to the jury.

The instruction offered was correct and important, and the refusal to give it was error that may have been prejudicial to defendants. For this error alone, the court did not err in granting defendants' motion for a new trial; for although the order was made on the ground that the evidence was insufficient to justify the verdict, it is well settled that "a wrong reason will not vitiate or affect a correct judgment or result." *Scott vs. Haines*, 4 Nev., 432.)

The order of the District Court granting a new trial is affirmed.

We concur:

LEONARD J.,
BRATTY, J.,
HAWLEY, C. J

CALIFORNIA LEGAL RECORD.

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No. 7.

Legal Notes.

THE SUPREME COURT AT LOS ANGELES.—The October term of the Supreme Court,—(the *first term* under the *new law*) will be held at Los Angeles, to open the second Monday of October (14th), and Clerk D. B. Woolf, Esq., starts for that city to-morrow to make the proper arrangements for court room, etc. That term will be followed by the November term at Sacramento,—but meantime the July term (the *last* under the *old law*) will meet in San Francisco on the second Monday in July, (8th) at which time the NEW RULES go into effect. See last cover page of the RECORD, No. 6, 7, etc.

CHINESE NATURALIZATION.—Owing to the great number of Supreme Court decisions still ahead, we feel obliged to omit from this number the opinion recently rendered by Judge Sawyer of this U. S. Circuit, on the important question of Chinese naturalization. The decision is based upon the point that the Mongolian race, cannot be considered "White persons" in the general acceptation of the term, and that Congress in its debates upon revising the U. S. Statutes so declared its construction;—and in not being "white persons," or of "African descent," they are fully debarred. We anticipate, the carrying of the case to the U. S. Supreme Court for a final decision—meantime the decision has been pretty generally published in the papers.

A NOVEL POINT OF LAW.—A case involving a novel point of law was decided by the County Court of San Joaquin County on the 4th inst. The facts of the case were these: A jury in a civil case while out deliberating was taken by the Sheriff to a restaurant to eat. As the county had refused to pay for feeding juries in civil cases, the Sheriff told the restaurant keeper to collect from the jurors, of this, however

the jurors had no knowledge. E. T. Lake, one of the jurors, refused to pay for his meal, and was sued by the restaurant keepers, Mittrovich & M Sclerandi. No express promise to pay was proved. The Court held that, under the circumstances of the case, the law would not imply a promise, on the part of the defendant, to pay for what he ate, and gave judgment in his favor.

RAIL ROAD "PRO RATA CASE."—An important decision was rendered on May 8th, in the U. S. Circuit Court at Omaha, by Judge Dundy in the somewhat noted case of the Kansas Pacific and Denver Pacific vs. the Union Pacific Railway. After the declination of Judge Dillon to decide the case and turning it over to Judge Dundy, the Kansas Pacific, one of the plaintiffs, moved an order to dismiss the case,—which order the defendant, the Union Pacific, moved to vacate, and it was so decided,—*not to dismiss*. The judge then decided, on merits;—that the Denver was a *branch* of the U. P., and that the rate charged by the U. P. for west of Cheyenne might be determined by the increased cost of construction and operation on that part of the road;—which in effect defeats the claim of the Kansas to the mileage-pro-rata, and entitling the U. P. to a greater than one half share of the through rate per mile.

PERSONAL.—Our friend, R. M. SWAIN, Esq., of Napa City, showed his genial countenance at the RECORD office on Wednesday. He still continues to counsel the "Public Administrator" in his administration of *post mortem* justice and "effects."

COLES BASHFORD, at whose election as Governor of Wisconsin in 1856, the famous school-land-steal ring of that State under Barstow was scotched,—and to whom we had the honor and pleasure of paying his official salary, during 1857—recently died at Prescott, Arizona—having honorably filled the position of delegate to Congress,—as well as the secretaryship of that territory. He was a native of New York State, where he received his legal education.

Supreme Court of California.

[April Term, 1878.]

[No. 5993.]

[Filed April 22, 1878.]

ALLEN vs. TIFFANY AND MOTT.

Appeal from Seventeenth District Court,—Los Angeles Co.
SEPULVEDA, Judge; and DENSON, acting Judge.

GUARDIAN'S ACCOUNTS.—JURISDICTION.—A guardian's settlement of accounts with his ward should not of itself constitute a discharge from his trust; but is subject to the approval of the Probate Judge.

The Probate Judge has exclusive jurisdiction of all such accounts. The ward may apply for a citation compelling the guardian to settle accounts before the Judge, but cannot bring suit in the District Court for a supposed balance.

STATEMENT OF FACTS.

On May 22, 1872, F. P. F. Temple was appointed by the Probate Court of Los Angeles County, guardian of the plaintiff, Rosina Allen, and gave bonds in \$12,000, with Geo. H. Tiffany and Stephen H. Mott as sureties, and he so acted until November, 1875, when plaintiff became of age. During that time Temple had received a large amount of money for plaintiff, and had bought in her behalf, a piece of land of W. H. Steel for \$2,500, but had taken the deed in his own name and held it in trust, as security for advances to plaintiff;—while plaintiff had been in full possession of the land, and expended \$5000 upon it for improvements.

On January 13, 1876, Temple made an assignment to Freeman and Spence for the benefit of his creditors,—which caused a cloud upon plaintiff's title to the land,—and on July 10, 1876, Geo. E. Long became his assignee in bankruptcy.—No settlement had been made by Temple with the Probate Court on plaintiff's account, and on November 25, 1876, plaintiff brought an action against Temple and the two sureties for an unpaid balance of \$869.54 and interest. The two sureties demurred, and on motion of plaintiff their names were stricken out, and a judgment obtained against Temple for the amount and costs \$55.20. That judgment never having been paid, the plaintiff now brings action, against the defendants, Tiffany and Mott, (as sureties on the bond), for its recovery, and damages, interest, and expenses to the amount of \$1,834.84, and to confirm to her the title to the said land free from shadow by the said assignment. The defendants demurred that the Court had no jurisdiction while the account was pending and unsettled in the Probate Court.—Demurrer overruled.—In answer they denied all liability until such settlement of the Probate account. Plaintiff demurred to this answer which was sustained.—Judgment given for plaintiff, for the confirmation of the deed, and the recovery of \$833.89, resulting from the former judgment.—Defendants ap-

pealed January 24, 1878, from the judgment and made point that the matter should have been settled in Probate Court, which had exclusive power over guardians and wards and their accounts.

Thos. H. Smith, and E. M. Ross, attorney for plaintiff and respondent.

Bicknell & White, attorney for defendant and appellant.

OPINION BY THE COURT.

Section 1754 of the Code of Civil Procedure provides that certain conditions shall form part of the bond of a guardian appointed by the Probate Judge "without being expressed therein."

Among these are those mentioned in the third subdivision of the section, which reads as follows:

"3. To render an account, on oath, of the property, estate and moneys of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other time as the Court directs, and at the expiration of his trust to settle his accounts with the Probate Judge, or with the ward if he be of full age, or his legal representatives, and to pay over and deliver all the estate, monies and effects remaining in his hands or due from him on such settlement, to the person who is lawfully entitled thereto."

The purpose of the provisions of the Code is that the Probate Judge shall retain the supervision and direction of the guardian and of his management of the person and estate of the ward, until discharged by the appointing power.

Within a reasonable time after the ward arrives at full age, the statute provides that the guardian may settle his accounts with the ward; but considering the previous relations of the parties, it is not to be supposed that it was the intention that such settlement should of itself constitute a discharge, or that it should not be subject to the approval or disapproval of the Probate Judge, prior to the discharge by him. The Probate Judge has exclusive jurisdiction to determine the state of accounts between the guardian and ward. The ward may agree upon a settlement with the guardian, subject to the approval of the Probate Judge, or may apply for a citation compelling the guardian to settle his accounts before the Probate Judge. But to hold that prior to such accounting before the Probate Judge, or to his order approving the settlement *in pais*, the ward may bring suit in the District Court for a supposed balance, would destroy the symmetry and efficiency of the system furnished by our law for the appointment and conduct of guardians of infants.

It appears on the face of the complaint that plaintiff made no attempt to compel an accounting in the Probate Court before bringing the present action. The demurrer to the complaint should therefore have been sustained.

Judgment reversed and cause remanded, with directions to sustain defendant's demurrer to plaintiff's complaint.

[No. 5827.]

[Filed April 22, 1878.]

ELLIOTT vs. PECK, ADMINISTRATRIX.

Appeal from the Twentieth District Court, Santa Cruz Co.
D. BELDEN, Judge.

PROBATE PROCEEDINGS—CREDITOR'S CLAIM.—The findings should specify the time when the creditor's claim became *due*, in order to determine if its presentation was in time.—(Sec. 1493, C. C. P.)

STATEMENT OF FACTS.

In this case Wm. Elliott, plaintiff, brought action to recover from Maria A. Peck, administratrix of the estate of Henry W. Peck deceased, \$3,285.00 being the proceeds of an undivided interest in two certain Quicksilver mines in San Luis Obispo County, which they had owned and worked together previously to August 28, 1872,—which mining claims had not then any recognized market value. On that date, a meeting of the owners of the mine was proposed, to settle their accounts, and arrange for further development, or sale. Elliott's health being bad, and the two being intimate personal friends, Elliott made deeds to Peck of his interests in the mines, to enable Peck to manage affairs for him. The deeds were on quit claim forms with an expressed money consideration, and were absolute on their face, but no valuable consideration was paid nor agreed to be paid. After this Peck took possession, and management of the claims. On September 14, 1873 Peck died intestate, having made no disposition of the mining claims. On October 19, 1874, his widow, Maria A. Peck, was appointed administratrix of the estate. The inventory of the estate included these claims as belonging to it. On October 30, 1874 notice was given to creditors, and on September 17, 1875 Elliott presented his claim for \$3,285, as purchase price of said claims, which the administratrix disallowed. In June, 1875, and before Elliott presented his claim, the administratrix sold (under order of Probate Court) the mining claims, which had been conveyed by Elliott for \$6,575. On September 26, 1875, the proceeds of the estate were distributed including the proceeds of the mines. After such distribution, on November 8, upon application of Elliott, this distribution was vacated and set aside. Trial June 21, 1876—Jury waived. Judgment for plaintiff for \$3,103, and costs 64.40, entered September 11, 1876. Motion by defendant for new trial December 18, 1876—from which plaintiff appeals August 2, 1877.

Chas B. Younger and F. Adams, attorney for plaintiff and appellant.

J. H. Logan, attorney for defendant and respondent.

OPINION BY THE COURT.

There is no finding from which it can be seen at what precise time the claim of Elliott became due. This was necessary in order to determine whether the presentation of the claim—made on the 17th of September, 1875—was within the time required by the statute. (*Code of Civil Procedure*, section 1493). Order affirmed. Remittitur forthwith.

[No. 5852.]

[Filed April 20, 1878.]

PHIPPS vs. HARLAN.

Appeal from Twentieth District Court, San Benito County,

D. BELDEN, Judge.

AFFIRMATIVE DEFENSE—FINDINGS.—Watson, one of the defendants, having set up a separate and affirmative defense, upon which no finding was made—*Held*, that an additional finding should be made on that point,—upon which to proceed to judgment.

STATEMENT OF FACTS.

Isaac Phipps died intestate on May 10, 1872, his only heirs being Sarah Jane Harlan, (wife of R. Harlan, defendant), and the plaintiff, Edward L. Phipps, grandson, a minor, being son of Lemon W. Phipps deceased. Harlan became administrator July 2, 1872, with bonds for \$23,000, with five sureties—Job. Malsbury \$3000, Wm. T. Brown \$5000, Chas. D. Fowler \$7000, S. S. Swop \$3000, and Stephen Watson \$5000. On November 3, 1876, Harlan's final account was allowed, showing \$8,551.32, of which \$4,276.66 was due plaintiff, and that for \$2,000 of this amount Thos. H. Swain his guardian received a house and lots in Hollister for the use of plaintiff;—and that Harlan pay the balance due plaintiff, in gold coin, \$2,275.66, and to S. J. Harlan the other half, \$4,275.66 in gold coin. This action is brought to recover the said \$2,275.66, as never having been paid. All the defendants demur, which is overruled. All answer April 5, 1877, and deny the bond, or the appointment of Swain as guardian of plaintiff—amended answer April 6, 1877, all except Watson deny the same. Separate answer by Watson, claims he was discharged June 21, 1873, from the bond, and a supplemental bond filed, with new sureties—Cause tried May 18, 1877—Jury waived—and judgment for plaintiff for the \$2,275.66 and interest—amount \$2,398.23—and costs \$21.25. Motion for new trial by defendants:—Overruled August 6, 1877. Appeal September 12, 1877 from the judgment and order by both sets of defendants.

E. W. McGraw and J. J. May, attorneys for plaintiff and respondent.

*W. S. McPheters and Jas. F. Breen, attorneys for defendants and appellants
J. J. Harris, for S. F. Watson, defendant and appellant.*

OPINION BY THE COURT.

Judgment and order denying a new trial affirmed as to the defendants Harlan, Malsbury, Brown, Fowler and Swope. Remittitur forthwith.

The judgment as to the defendant, Watson, reversed for want of a finding upon the affirmative defense set up in his answer, and as to him the cause is remanded with directions to make an additional finding upon the said affirmative defense and thereupon to proceed to judgment as to the said defendant Watson. Remittitur forthwith.

[No. 10,336.]

[Filed April 22, 1878.]

PEOPLE vs. GREEN.

Appeal from the County Court of San Joaquin County,
W. S. BUCKLEY, Judge.

WITNESS—ERRONEOUS PROCEEDING.—The court directed a witness to accompany the Jury, under charge of the Sheriff, and show them the place where the offense was committed, and where the different parties stood during its occurrence:—*Held* that this was erroneous,—not only being opposed to the letter of the code,—but subversive of the principle which gives to a defendant the privilege of being confronted by the witness against him in all evidence given.

STATEMENT OF FACTS.

Wm. Green, with three others, was indicted by the Grand Jury of San Joaquin County, on November 21, 1877, for Robbery and Felony, for taking \$3, in silver coin from James Burnet, in a saloon,—taking it from his pocket—for which they were arrested by two policemen on the spot—and convicted of larceny in the Police Court. Trial under the indictment set December 8th, resulting in a verdict of guilty, time for sentence on 15th, continued to 17th, for argument on motion for arrest of judgment—when E. T. Stone, acting Judge amended the conviction to robbery and prior conviction for larceny, and sentenced him to State Prison for life.—Before sentence had been pronounced, defendant moved for a new trial on the ground (among others) that Jury received evidence out of Court other than that resulting from a view of the premises;—in other words, that one of the witnesses, Joa. L. Nye, one of the officers who made the arrest, had accompanied the jury in viewing the premises, by order of the Judge,—to which defendant's counsel took exception.—(The testimony of this witness in connection with the visit of the jury to the premises is fully given in the opinion).—Motion for new trial denied, and an appeal taken on February 8, 1878 from that order—and claiming that whatever force was shown or used was done in a quarrel, and not in a conspiracy.

J. A. Hoosmer and J. A. Campbell, attorneys for people and respondent.

W. Minto, Jas. H. Budd, Wm. H. Gibson, and S. L. Terry, attorneys for defendant and appellant.

OPINION BY THE COURT.

On cross-examination, the witness Nye stated that he and Collins during all the times that the occurrences he testified to were going on, were in a yard back of the saloon, and the back room was between them and the front room where the bar was. That the partition, over which he couldn't see ran between the front and back room, and the door in this partition was closed. That the only way he could see what took place in the front room was by looking through an opening in the partition at the end of the coanter, about four feet by two over the ice chest, which was the same height as the counter. They standing at a door leading from the back room to the yard, about sixteen feet from the ice chest.

This testimony was given in answer to questions asked by the defendant's counsel for the avowed purpose of showing that it was impossible for the witness to have seen what took place in the bar-room while the witness was at the back door.

Mr. Campbell, for the prosecution asked the Court to send the jury in charge of the witness Nye, to see the Independent saloon, and that Mr. Nye should show the jury the relative positions of these parties.

Mr. Terry, for defendant, objected to Nye making any explanation to the jury out of Court.

The Court said: He (Nye) may go and show them (jury) where he stood, and where the parties stood, but not any further.

To Mr. Nye—Mr. Nye, you will go with the jury *and show them the position that you occupied during the transaction, and where the other parties were and where Officer Collins was, and they can judge for themselves after that.* There are not to be any explanations or comments made, except to show the jury where these parties were at the time the thing occurred.

Mr. Sheriff, you will take charge of the jury.

Mr. Terry, defendant's counsel, excepted to the order of the Court.

The jury went to view the premises in charge of the Sheriff, who was first sworn as required by law. This proceeding was erroneous. Section 1119 of the Penal Code provides: "When, in the opinion of the Court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the Sheriff, to the place, which must be shown to them by a person appointed by the Court for that purpose; and

the Sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into Court without unnecessary delay or at a specified time."

The action of the Court was not only opposed to the letter of the Code, but also to the purpose of the oath required to be administered to the officer who conducts the jury to the place mentioned in the order, and to the principle which gives to a defendant the privilege of being confronted by the witness against him.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 5931.]

[Filed April 22, 1878.]

KELLEY vs. MCKIBBEN.

REPLEVIN—FINDINGS.—In an action of replevin, if the findings are indefinite as to the articles of property claimed;—and if a reference to the complaint does not render them clear and intelligible, a judgment based thereon is uncertain and invalid.

AMENDED COMPLAINT.—When the original complaint does not contain full data for reference by the findings, it may be proved that the *amended* complaint was *intended* to be referred to.

Appeal from Fourth District Court, San Francisco County.

R. F. MORRISON, Judge.

STATEMENT OF FACTS.

Wm. McKibben, defendant, acting as Sheriff, seized certain household goods on December 18, 1875, at No. 205 Taylor street, to satisfy a judgment of one O'Brien against a Mrs. Morgan. Luke C. Kelly, plaintiff, claimed to own the goods,—valued them at \$1,000,—and brought action for their recovery and damages \$500. Defendant demurred that the complaint was ambiguous,—did not sufficiently describe the property.—Complaint was then amended,—more fully specifying the property, and demurrer withdrawn.—Defendant's answer claimed official duty, denied it being the plaintiff's property, and was only worth \$350. Case tried December 18, 1876, without jury,—and the findings were for plaintiff, (except certain articles) and the goods worth \$399,—and costs of recovery \$150; and \$94.70 costs of court. Judgment for those amounts, or a return of the goods and costs.—Defendant moved to retax the costs, which was dismissed,—upon which he appealed from the judgment and order;—making points that decree should have been for *possession* of goods, and not *return*—and that damages and interest are illegal in action of replevin.

Daniel T. Sullivan, attorney for plaintiff and respondent.

Morgan & Sullivan, attorney for defendant and appellant.

OPINION BY THE COURT.

The Judgment recites that the case having been submitted for decision, the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith. It then proceeds as follows: "Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed that Luke C. Kelley, plaintiff, do have and recover from William McKibben, defendant, judgment for the return of said property *mentioned therein*, or if such return cannot be had, then for damages," etc.

The most favorable view for the plaintiff is that the property "mentioned therein" is the property mentioned in the findings, mentioned in the recitals by which the judgment is preceded. Upon reference to the findings, however, it appears that no property is actually mentioned there except certain property of which the plaintiff is found *not to be the owner*. The property which is found to belong to plaintiff is not mentioned at all in the finding, but is stated therein to be the property "*mentioned in the complaint*." Upon looking into the *complaint*, no intelligible description of the property is found there.

It may be proved that the reference to the *complaint* is mistaken and that the *amended complaint* is really intended. But this will be found not to relieve the difficulty, for though the amended complaint contains an enumeration of the articles of personal property sued for, it is manifest from the findings already referred to, that several of them are found not to be the property of the plaintiff, and yet the excepted articles cannot be selected with any degree of certainty from the list enumerated in the amended complaint.

In short, the judgment is uncertain in itself, and the reference by which it is attempted to be supported does not make it certain.

The conclusion to which we have arrived upon this point, renders the decision of the question upon the taxation of costs below, unnecessary.

Judgment reversed and cause remanded.

Neither Mr. Justice McKinsty nor Mr. Justice Rhodes expressed an opinion.

A petition for rehearing was filed May 6th, by the respondent, on the ground that the *amended complaint* became the *complaint*;—and a stay of proceedings is granted.

[No. 10,330.]

[Filed April 25, 1878.]

PEOPLE vs. JONES.

Appeal from County Court, San Joaquin County,
W. S. BUCKLEY, J.; and E. T. STONE, acting Judge.

INSTRUCTION TO JURY—REASONABLE DOUBT.—A jury may find a defendant guilty of any offense necessarily included within that charged in the indictment; and if they have a reasonable doubt as to the greater or less offense having been committed, the defendant is entitled to the benefit of that doubt, and also to instructions by the Court to the jury to that effect.

STATEMENT OF FACTS.

James Jones was indicted, with three other persons, by the Grand Jury of San Joaquin County at the November term of 1877, for robbery and felony—in taking \$135, gold coin from Geo. Kimble by force. Case was tried December 11th, and several instructions asked by both plaintiff and defendants, to be given the jury; and all given except one (the 17th.) asked by the defendant as follows:

"If the jury believe from the evidence that this defendant did enter into an agreement to commit the crime committed by Meehan;—if they find a crime was so committed, and have any reasonable doubt as to whether the crime committed was robbery or grand larceny, they must give the defendant the benefit of the doubt, and find him guilty under this indictment of the crime of grand larceny."—Which was refused. A verdict of guilty of robbery, was rendered December 17th. — Before sentence, defendant moved for a new trial, which was overruled.—Then a motion in arrest of judgment;—on two points.—First, the taking was not fully proved to be done through fear or force,—and second, verdict did not conform to sec. 950 —2 of Penal Code, evidence not being certain and definite and direct on the offense charged.—Motion denied; and defendant appealed January 4, 1878—on ground of conflicting evidence as to *force being used*,—the prosecuting witness being intoxicated, and part of the time unconscious when it was committed.

J. A. Hoemer, attorney for people and respondent.

Stanton L. Carter, attorney for defendant and appellant.

OPINION BY THE COURT.

The Court erred in refusing to give the *seventeenth* instruction which was to the effect, that under the indictment for robbery the jury might find the defendant guilty of a larceny, if they entertained a reasonable doubt as to which of the two offenses he was guilty.

Robbery is larceny committed by violence from the person of one put in fear. "The indictment for robbery charges a larceny, together with the aggravating matter which makes it in the particular instance robbery." (2 *Bish. Cr. L.*, 1158.) In

the Penal Code, section 484, larceny is defined: "The * * * felonious * * * taking * * * the property of another." And section 211 of the same Code declares: "Robbery is the felonious taking of personal property in the possession of another, *from his person or immediate presence*, and against his will, accomplished by means of force or fear."

It is obvious from the foregoing definitions that an indictment for robbery must aver every fact necessary to constitute larceny, and more.

The jury may find a defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. (*Penal Code*, 1159) And as there was some evidence tending to show that the crime was merely larceny, the defendant had the right to insist on the instructions he requested the Court to give.

Judgment and order denying new trial reversed and cause remanded for a new trial.

[No. 4,989.]

[Filed April 20, 1878.]

MCCAUSLAND'S ESTATE.

Appeal from the Probate Court of Santa Clara County.

D. S. PAYNE, Probate Judge.

PROBATE PROCEEDINGS—EXCLUDED TESTIMONY,—

A "FAMILY ALLOWANCE" NOT A "CLAIM OR DEMAND" AGAINST AN ESTATE.—

An application in Probate Court for a family allowance is not an action or proceeding *against* an executor or administrator, or adverse to the estate, and likely to impair or diminish it,—hence the applicant's testimony cannot be excluded.

The term "claim" or "demand," as used in the Probate Act, does not include a claim for a family allowance.

MARRIAGE CONTRACT.—A contract of marriage may be decisively established by proof of a marriage in the present, and also *per verba de futuro cum copula*.

STATEMENT OF FACTS.

This case seems to be an important one, and has quite a chronological history.

Its decision by Judge Payne in the Probate Court of Santa Clara County, on October 7, 1875, gave an allowance to the Petitioner from the estate. The heirs appealed, and on February 7, 1876, the Supreme Court affirmed the decision. A rehearing, asked for by the heirs, was granted, and on December 21, 1876 it was reversed,—Judge Rhodes dissenting. The Petitioner then asked another rehearing in January, 1877, upon which, as we understand it, this present decision is now finally rendered,—reaffirming the judgment and order of the Probate Court.

Wm. McCausland died in San Francisco on May 5, 1874, leaving an estate appraised at about \$30,000; and Letters of Administration were granted to F. R. Smith, Public Administrator of Santa Clara County.—Annie McCausland, claiming to be his widow, petitioned the Court for an allowance of \$100, per month, during the administration of the estate. This was opposed by five persons claiming to be the heirs of McCausland, on the ground that she was never married to him, and never *claimed* to be till after his death, but was known as Mrs. Annie Forrester. Cause was tried April 26th to 30th, 1875, and on October 7th, 1875 decision was rendered in her favor, allowing the \$100, per month from the time of his death. Upon this trial there was no allegation or evidence of a ceremonial marriage; but it was held that, marriage under our law being considered a civil contract, and no particular form or ceremony essentially necessary, the contract could be *inferred* from a *proved* "assumption of marital rights, duties, and obligations." It was proved that they became acquainted in 1860, when she was about thirteen years old, and after a few months he proposed marriage, which she at first refused on account of her age, etc., but afterward consented, and they commenced living together, and he acknowledged the relation, which she claims was a legal marriage,—and sustains by a large number of witnesses. "The proof is conclusive that from the spring of 1873 until his death they lived in San Francisco as man and wife;" and during his last sickness her attendance was constant, and her care of him tender and faithful as any wife could be. Hence that she was entitled to participate in the estate.

The heirs moved for a new trial, with a full statement of the case, which was denied on December 3, 1875,—and an appeal taken. Upon this appeal an affirmative decision was rendered on February 7, 1876,—on the ground of the evidence proving "both a contract of marriage in the present, and also a contract *per verba de futuro cum copula*;"—and declining,—under the "conflict of evidence,"—to "disturb the findings of the Court below." After this a *rehearing* by the Supreme Court was granted, on application of the heirs, and a decision rendered on December 21, 1876, reversing the former, on the single point that the petitioner should not have testified in support of her "claim" on the estate under the statute, (sec. 1880, C. C. P.). From this, Judge Rhode dissented,—that a "Family allowance was not a 'claim or demand.'" The Petitioner then filed for a *second rehearing* in January, 1877, with an exhaustive array of authorities on the point of the term "claim or demand"—The decision now rendered,—after more than a year,—is, we assume, a final conclusion of the whole matter.

J. E. McElrath, attorney for Petitioner.

Fox, Campbell and Fox, attorneys for the Heirs.

OPINION BY THE COURT.

The petitioner, who claims to be the widow of the deceased, upon the hearing of her petition for a family allowance, was permitted to testify in her own behalf, against the objection of the heirs. The third subdivision of section 1880 of the Code of Civil Procedure provides that "Parties to an action or pro-

ceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of the deceased," cannot be witnesses. It is contended that this provision excluded the petitioner.

An application for a family allowance is not an action or proceeding against an executor or administrator. In this respect it is similar to an application for a partial or final distribution of the estate, or the payment of a legacy. The action or proceeding contemplated by the section referred to, is one which is adverse to the estate, by which some relief is sought, which will diminish or impair the estate. The case stands in this respect, as it would do were it conceded that the petitioner is the widow of the deceased, and were she offered as a witness to prove any other fact respecting the family allowance.

The words "claim or demand against the estate of the deceased" ought to receive the same interpretation as they do when found in the several provisions of the Code of Civil Procedure respecting the settlement of the estates of deceased persons. In that connection the words "claim" and "demand" are used synonymously. See sections 1643, 1467, 1448, 1494, 1497, 1510. In *Fallon vs. Butler*, 21 Cal. 32, Mr. Chief Justice Field, in delivering the opinion of the Court, said: "Whatever signification there may be attached to the word 'claim,' standing by itself, it is evident that in the Probate Act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered." This definition, which in our opinion is correct, will not include a claim for a family allowance.

There was evidence tending to prove both a marriage in the present, and also a contract *per verba de futuro cum copula*. (1 *Bish. on Marriage and Divorce*, sec. 253, sec. 443) This is decisive on that issue, although the evidence was conflicting.

Orders affirmed. Remittitur forthwith.

U. S. SUPREME COURT DECISION.—Washington, April 22d.—The Supreme Court, in an Illinois case, decided substantially to-day that the creditors of a bankrupt company are entitled to the whole capital of the bankrupts, as a fund for the payment of the debts due them, and this they could not, if the transferee of shares is not responsible for whatever remains unpaid upon his shares, for, by a transfer on the books of the corporation, the former owner is discharged.

Circuit Court of the United States.

NINTH DISTRICT OF CALIFORNIA.

MAHONEY MINING COMPANY

VS.

SAMUEL BENNETT.

FRAUDULENT LEASE OF A MINE.—Where a board of directors of a mining corporation makes a nominal lease of the mine owned by the corporation, to a party really acting in the interest of a minority of the stockholders, not in the ordinary course of the business of the corporation, but for the purpose of withdrawing the mine from the control of a board of directors about to be elected at an approaching meeting of the stockholders, and thereby perpetuating the control of the minority, a Court of Equity will cancel the lease on a bill filed by the corporation for that purpose.

SAWYER, Circuit Judge, delivering an oral decision:

This case was argued very thoroughly, and the testimony was very fully read on the hearing. It is a bill in Chancery to set aside a lease of a mine for three years, with an option to purchase at the price of two hundred and fifty thousand dollars within that period. The ground alleged is that this lease was made, not in the due and proper course of the business of the corporation, but by a conspiracy, in fraud of the rights of the majority, and in the interest of the minority, of the stockholders. The bill is filed to cancel the lease on that ground.

Testimony has been introduced and arguments have been made with reference to the irregularity of the election of both the boards of directors claiming to represent the corporation; but I do not find it necessary, in the view I take of the case, to decide as to the ultimate validity of those elections; and I shall assume, for the purpose of the decision, that the election of the first board of directors by whom the lease was made, was valid. The result of that election is only important, in the view I take, so far as it bears upon the question as to the purpose for which this lease was made. There are certainly some irregularities in it, and some extraordinary circumstances connected with that transaction. Nevertheless, I shall consider those in this case only as indicating the motives of the actors, and their bearing upon the validity, or legal propriety, of this lease.

The mine seems to have been worked without any difficulty up to a certain time in April, 1877. The two principal stockholders owned fifty-two hundred shares each, and there were sixteen hundred shares outstanding, belonging to Sharon, Bell, Sunderland and Flood & O'Brien. One of the directors—the director who, as I understand it, represented the interests of Sharon, Bell, Sunderland and Flood & O'Brien—resigned; and the remaining directors called a meeting of the stockholders for the purpose of electing a new board of directors. This meeting was called, apparently in the interest of the Selig-

mana. The other large stockholder, Stewart, owning an equal number of shares with the Seligmans, was at the time temporarily absent on business in New York, and was not notified of the calling of the meeting of the stockholders. A thousand shares of the stock of the company, owned by Sharon, Bell, and Flood & O'Brien, stood in the name of one, Bush as trustee, and were voted at that meeting by him, without the knowledge or consent of the owners, who were in the city at the time; and neither Sharon nor Bell was aware that his stock had ever been issued, and neither had notice of the calling of the meeting. These shares were required to constitute a majority of the stock.

At that meeting a new board of directors was elected, most of them, apparently, being merely nominal owners of stock, holding a few shares in order to qualify them to act as directors. The meeting seems to have been organized, and the new directors elected, under the management of Benjamin, acting in the interest of the Seligmans; at all events these directors were elected to control the corporation; and, for the purposes of this decision, I shall assume that they had authority to act as directors in the usual business of the corporation.

When Stewart returned to the city within a few days after, and ascertained what had been done, there was dissatisfaction, and some discussion over the matter. Previous to this time there had been no meeting of the stockholders or election of directors since the first board was elected, three or four years before; and, as the by-laws of the corporation contained no provision for the calling of an annual meeting, the statute provides that, in such a case, the time of meeting shall be the first Tuesday in June [Civil Code, Sec. 302]. In case no meeting is called by the board at the time appointed by law, one-half of the stockholders are authorized to call one. [Civil Code, Secs. 310, 314.] The extraordinary meeting was held on May 1st, a few days only over a month prior to the time appointed by the statute for the annual meeting. Stewart upon ascertaining the condition of things—that the one thousand shares of Sharon and Bell and others had been voted without their knowledge and consent,—bought up these outstanding shares before the first of June, and immediately notified all the stockholders and the directors of the calling of a stockholder's meeting in June, in the mode designated by the statute. Immediately on receiving that notice, the directors elected on the first of May met, on the first of June, and without having previously had any consultation in regard to the matter—Benjamin, representing the Seligmans, being the active party—it was proposed to make a lease of the property to one Bennett, a brother-in-law of Benjamin; and the board passed a resolution authorizing the making of the lease, and the lease was thereupon made,—the lease in question here. All this was accomplished before and on the 5th of June.

Now, the question is as to the purpose of that lease. It is claimed on the one side that it was made in good faith, in the interest of all the stockholders; and on the other side it is claimed that it is a mere sham, gotten up for the purpose of keeping the control of the mine from passing into the hands of the majority of the stockholders in case they should elect a new board of directors at the meeting called in June. It is admitted by the principal witnesses, and by the ones particularly active in the matter, that that was one of the

purposes of the lease. It is so stated in their testimony, and I think no one can read that testimony without being satisfied that that was the controlling and moving purpose of this lease. It is very manifest, to my mind, that Bennett was not the real lessee, but was a mere instrument in the hands of Benjamin, acting in the interest of the minority of the stockholders at that time. Bennett was a man not likely to take such a lease, having no sufficient means with which to carry on such undertaking, not being a man of experience in mining, or a person whom business men of ordinary judgment and prudence would be likely to entrust with such an enterprise. From the testimony, it appears manifest to my mind that the money paid out by him after assuming control of the mine was furnished by other parties, and not by Bennett—that Benjamin was still the active and controlling man as before. It is impossible, it seems to me, after reading the testimony in the case, to come to the conclusion that the transaction was really a *bona fide* lease to Bennett, for his own purposes. Bennett was but the instrument—the shadow of the real parties seeking to withdraw the control of the mine from the board of directors about to be elected by the majority of the stockholders.

Now it may well be, that, in making such a lease, the parties representing the minority, may have believed that the interest of all the stockholders was advanced; but in this case, where the lease is given with an option to purchase the mine for two hundred and fifty thousand dollars, it is certainly a remarkable fact that the man who was active in the matter should have been Benjamin, both before and after the lease. Manifestly, the controlling purpose was to circumvent the other stockholders, who were seeking, at the proper time, and in the mode appointed by the statute, to elect a new board of directors, and to put the mine beyond their reach and control, in order that the Seligmans might control it according to their own ideas of what was right and proper. Whether or not this was, as the complainant insists, intended as a fraud, the manifest operation of the proceeding, if consummated, would be to work a fraud upon the rights of a majority of the stockholders. Upon that ground I think the lease was not made in the due and regular course of business of the corporation, or for any legitimate purpose. It was made for the purpose of diverting the mine into the control of the minority of the stockholders, against the opposition of the majority, without any representation on the part of the majority, in case the majority should succeed in establishing their control of the corporation—should elect a new board of directors at the coming meeting.

It is said that this new election was void, and that the acts of the new board of directors are not the acts of the corporation. The new board was elected by a majority of the stockholders at a meeting held at a time and in the manner authorized by law, and a State Court has decided that election to be valid; and although there is an appeal pending, that judgment is still unreversed. At all events, the new board is in active control, and, as I understand it, in possession of the books, etc., of the corporation; and its members are now, and were at the time, *de facto*, acting as directors.

As to the management of the mine, we have nothing to do with that here. Upon the vacation of the lease, the mine, as it should be, will be subject to the control of the legal board of directors, whoever they may be. The new members were doubtless all elected in the interest of those opposed to the Seligmans, as the old ones were in their favor. But we have nothing to do with that in this suit. I have disposed of the only question involved in the case in determining that this lease was made for an unlawful purpose—for the purpose of taking the mine out of the control of those who were to succeed in the management of the mine, should an election be lawfully held in pursuance of notice already given: a purpose which, in my judgment, renders the lease an unlawful exercise of the powers assumed and exercised by those parties by whom it was made, and therefore that it should be cancelled.

Let a decree be entered cancelling the lease, in pursuance of the prayer of the

bill, and making the preliminary injunction issued perpetual.

April 22, 1878.

McAllister & Bergin, and Stewart, Vanclef & Herrin, for complainant.
S. Heydenfeldt, and Geo. F. & Wm. H. Sharp, for defendant.

Recent U. S. Land Decisions.

Case of the Heirs of DAVID FOSTER.

DEPARTMENT OF THE INTERIOR, }
 WASHINGTON, D. C., April 3d, 1878. }

To the Commissioner of the General Land Office—SIR: I have considered the application of Messrs. Luce and Johnston, attorneys for the heirs of David Foster for a modification of so much of my decision of August 7th, 1877, as related to the N. W. $\frac{1}{4}$ of Section Township 2 South, Range 14 West, S. B. M., Los Angeles, California, holding that the state selection was valid and the pre-emption claim of Foster must be rejected.

This application is based upon the ground that the state selection was illegal and invalid, because not made in accordance with the provisions of an act of the legislature of the State of California, approved March 27th, 1863. It is not considered necessary at this time, however, to enter into a consideration of the alleged defects in the application of the purchaser; that it is a question between him and the state, and does not in my opinion enter into the merits of the question now before me. By the 7th section of the act of March 3, 1853, the State of California was granted indemnity for sections 16 and 36 lost in private grants. The manner of selecting such indemnity is not specified. The act of April 27th, 1863, was an act by the legislature of California, providing for the sale of certain lands belonging to the state, and if purchasers under the same fail to comply with the requirements of the statute, their claims may fail. (51 Cal. 128.)

The records of your office show that under date of April 22, 1868, the state locating agent made application to select the tract in question in lieu of land lost in a private grant. The tract was selected for the State, in accordance with the provisions of the act of March 3, 1853. The records also show that the Register of the United States Land Office at San Francisco certified that the authorized agent for the State had selected the tract in question, in part satisfaction of the grant made by the act of March 3, 1853. The action of the department approving the tract to the State was based

upon these certificates. The questions to be considered by the government were, first, the right of the State to claim the land under her grant, and second, was the tract subject to selection. Both these questions were determined in the affirmative, and in accordance with the facts. These were the only questions that it was necessary for the government to determine, as it recognizes only the State in the proceedings, and it was no part of its duty to inquire into the transactions between the State and her purchaser. Neither will it go back of the records to ascertain whether, as between the State and her agent, he complied with the provisions of her statute, relating to the sale of granted lands. The Department can look to the State only in the adjustment of a grant made to her. There is no complaint on the part of the grantee of irregularity in the selection; on the contrary, it has been recognized and approved, and patent issued to the purchaser January 31, 1873. Furthermore, the Legislature of the State of California passed an act for the relief of purchasers of state lands approved March 27, 1872, providing that "when application has been made to purchase lands from this State, and payment made to the Treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant, or his assigns, upon his making full payment therefor, provided, that no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase."

The State has thus, in the most emphatic manner, asserted her claim to the lands granted and approved to her notwithstanding an alleged irregularity on the part of her agent in selecting the same.

The records show that the State was entitled to the tract of land claimed as indemnity, that it was subject to selection, that said selection was made by the authorized agent of the State in accordance with the usages and practice of the Department, that it was approved in the usual manner by the Secretary of the Interior, and that the State has not relinquished her claim. Further then this the Department will not inquire upon the motion of any party not in interest as grantor or grantee.

The application must be denied, and the papers are herewith transmitted.

Very respectfully,
C. SCHURZ, Secretary.

—Opp's Land Owner for April.

Book Notice and Review.

MORGAN'S LEGAL MAXIMS.—This new book has just reached us from the prolific press of Robt. Clark & Co., Cincinnati, O. It is a rare and valuable work, comprising two thousand eight hundred and eighty-two foundation maxims of the law, patiently and judiciously culled from the ancient fathers, and heretofore largely inaccessible in the scarce old volumes of law-Latin and law-French. The English version is an intelligible translation rather than a literal;—and, interlinear with it is given the exact and authentic form of the original. It is alphabetically arranged, with a full index of subjects, in 1 vol. 12 mo. cloth, price \$2. By James Appleton Morgan, author of "The Law of Literature." It is always open for examination and reference on the reading table of the RECORD office.

THE AMERICAN DECISIONS: By A. L. Bancroft & Co.—Of this gigantic legal undertaking vols. 1. and 2. are already published, and vol. 3. will be ready about June 1st, proximo. A volume for each one or two months is hereafter expected to issue. Price per vol. \$5.

THE NOTARIES' JOURNAL.—We welcome to the RECORD table this valuable quarterly of 40 pages, which fills an important department in the legal world,—one well worthy of a special organ. Established in February, 1877, it has now reached the second number of vol. 2. Terms \$2. per annum, single numbers fifty cents. Edited and published by Robt. Owen, 110 Broadway, N. Y.

THE LEGAL REPORTER,—Nashville Tenn., Jere Baxter, Editor—New series, vol 2. No. 1. May.—A monthly of 32 pages, containing *recent and important opinions* by the Supreme Court of Tennessee. Terms \$3.50 per annum. Single numbers 50 cents. A very valuable, and well executed journal. We extend it a hearty welcome.

NEW YORK WEEKLY DIGEST.—Of cases decided in the the United States and State Supreme Courts, and Circuit and District Courts, and English. Vol. 6. No. 10. (May 6, 1878), 24 pages. H. Campbell & Co., publishers, 21 Park Row, N. Y.—Terms, \$5. per volume of 26 numbers. We greet it on its solid merits.

COPPS'S LAND OWNER.—The most reliable medium of land decisions and information from the Land and Interior Department of the United States—is published monthly—only \$2. per annum or 20 cents per copy—of 16 pages. Has entered upon its fifth volume. Always cordially welcomed.

THE ALBANY LAW JOURNAL,—Published by Weed, Parsons & Co.—Each week presents the pleasant face of an old friend. It is now well along in its seventeenth volume. Each number filled with good things, for the profession, in all departments. Twenty large pages closely printed. Only \$5. per year—two volumes of 500 pages each. Isaac Grant Thompson, editor.

THE WASHINGTON LAW REPORTER.—Published weekly by Jno. L. Ginok, Washington, D. C., is the official organ of the Supreme Court of the District. Terms \$4. per year. Every number contains valuable things. George B. Corkhill, editor.

CALIFORNIA LEGAL RECORD.

VOL. I.

MAY 18, 1878.

No. 8.

Legal Notes.

IMPORTANT CASES.—Some important cases are reported in this issue, and which have demanded extra time and effort, as well as space, hence, we feel that our readers will appreciate, and grant a little indulgence.

Our "Land Decision" department has yielded to the *Supreme Court Decisions*,—which we rank as of *first* consideration in the RECORD. Other important matter is awaiting a chance in. The 8 numbers of the RECORD now issued contain 90 decisions of our Supreme Court—23 more than have appeared in any other journal.

REHEARING.—Motions made for rehearing, and stay of proceedings granted, in case of Robinson vs. Gleeson,—reported in RECORD No. 5; and Wanzer vs. Somers,—in RECORD No. 6; also, in Wiggins vs. McFarlane, People vs. S. P. R. R. Co., and People vs. Hooper et al.

TO THE PROFESSION.—Could not all the members of the bar, when getting their *briefs* and *transcripts* printed, get an extra copy to send and file in the RECORD office, and thus very much facilitate our preparation of the "Statements of Facts?" *We* will always print an extra copy for *our* customers—without extra charge.

PERSONAL.—Our live friend, J. W. Rose, Esq., of Healdsburg, gave us a call on Monday, 13th; and Isaac Wright, Esq., of Oakland, shone in upon us on Tuesday, 14th. Let all our friends remember not to forget us when in town. The RECORD office is always open.

F. W. Lawler, Esq., has been appointed Commissioner of the Twelfth District Court.

Supreme Court of California.

[April Term, 1878.]

[No. 4790.]]

[Filed April 29, 1878.]

OAKLEY vs. STUART.

Appeal from the First District Court—Santa Barbara County.

WALTER MURRAY, Judge.

SCHOOL LAND APPLICATIONS—PRIORITY OF.—He who *first files* application for State School Lands, (16th and 36th Sections,) after the *actual survey*—the survey in the field—approved by the Surveyor General,—is entitled to a certificate of purchase. The identification of the land to the State is determined by the *actual survey*, so that an application attaches immediately upon survey, though the certificate of purchase may not issue until the notification of acceptance by the Register.

C. C. Oakley plaintiff and respondent vs. James F. Stuart defendant and appellant (Philip Cogrove, James Byrne, and James B. Linebaugh made defendants by order of court,)—and Isaac Miller, intervenor.

STATEMENT OF FACTS.

This is a contest for the right to purchase from the State, a half section of school land—(16th section); and its decision turns upon and establishes the question of the validity of an application to purchase this class of State lands as soon as sectionized in the field, and previous to the filing of the official map or plat of the survey in the U. S. Land office for the district, in which the land is located.

The State acquired the title to the land by act of March 3d, 1853, and the survey was as follows:—Township lines run in June 1854;—Section lines January 16, 1861;—and survey approved by the Surveyor General of the United States for California, on April 9, 1861, and a map or plat of same filed in his office during April, 1861, and a copy filed in the office of State Surveyor General. But an official map or plat was not filed in the U. S. Land office at San Francisco until April 11th, 1873,—twelve years later. Cogrove & Byrne had made a joint application (on January 9, 1869), to purchase the *whole section* but they conveyed all their interest to John W. Dwinelle on April 16, 1873, (and filed an abandonment on February 1, 1875,) and Dwinelle conveyed same to James F. Stuart on May 7, 1873. James B. Linebaugh made an application on January 6, 1871, to purchase the half section now in contest, which was approved April 16, 1874, and a certificate issued by the State Land Register on April 25, 1874. On April 12, 1873, the day after the plat was filed in the U. S. Land office at San Francisco, James F. Stuart filed his application in the State Surveyor General's office for the said land, and on April 25, 1873, Linebaugh conveyed to Stuart all his interest by deed, so that now Stu-

art had acquired all outstanding claims; or interests, and a certificate of purchase was issued to him on August 21, 1873.

He then assigned his said certificate to Isaac Miller, on September 27, 1873, —having already deeded the same on 22d.

Miller went into possession in the fall of 1873, and has so continued to occupy and cultivate ever since.

And now, C. C. Oakley, plaintiff, made application on February 24, 1874, and again on May 6, 1874, to purchase the same land, claiming that it was vacant and unoccupied in the spring of 1872 when he used some of it for pasturing stock, and afterward occupied a large part of it, and between January and April 1873, ditched and fenced, and sowed grain, and has occupied till now; and that Miller took possession of a part of it in the fall of 1873. Upon trial, and finding of facts, Judge Murray's conclusions of law were, that the applications of Stuart & Linebaugh were void,—and that of Oakley legal, entitling him to the purchase of the land,—on the authority of *Rooker vs. Johnson*, No. 4,359, of October, 1874; and that adverse possession appeared when Stuart's application was filed.

Judgment for plaintiff, with costs.

Appeal taken May 6, 1865;—and this is now upon a rehearing.

W. C. Stratton, attorney for plaintiff and respondent.

Eugene Fawcett, and *R. M. Dillard*, and *Edward R. Taylor*, attorneys for defendants, (and appellants,)

James F. Stuart, *in propria persona*, and *H. H. Haight*, for appellants.

Gray & Haven, of counsel for Isaac Miller, intervenor.

OPINION BY THE COURT.

The only material question is the validity of Linebaugh's application.

The statute provides: "Whenever a resident of this State desires to purchase any portion, not less than the smallest legal subdivision, of the 16th or 36th section of any township, *which has been surveyed by authority of the United States*, he shall make an affidavit," etc.

It would seem to have been the practice of the State Land Department, since the passage of the law, to treat as properly filed, applications filed at any time after *survey in the field*, and the approval thereof by the Surveyor-General. This practice accords with the natural meaning of the words of the statute, and unless it has been proved to be productive of confusion, or promotive of litigation, or otherwise to conflict with the policy of the law, we see no reason why the courts should depart from the construction given to the Act by those immediately charged with its administration.

The question was not involved in *Rooker vs. Johnson*, (49 *Cal.*, 3,) for no one of the several applications in controversy in that case was made intermediate the survey in the field

(the exact time of which did not appear) and the filing of the official plat in the Land Office.

Some of the applications under consideration in that case were filed in 1868, which was before the survey was made in the field. All the other applications were made after June 4, 1869—the day on which the plat of the survey was filed in the Land Office.

It is apparent, therefore, that the question made here was not presented, and could not have been presented for consideration in that case.

Section 12 of the act of 1868 provides that when an application is made, the Surveyor-General shall communicate with the proper United States Land Office, and ask that the land applied for shall be accepted in part satisfaction of the grant to the State, and only after the Register has notified the State Office of the acceptance of the land, can the State issue a certificate to the purchaser. The Register may not be able to inform the State Officer that he has accepted or rejected the land until after the official survey has been returned to his official custody. The State officer can issue the certificate only after the notice of acceptance, because the State law provides that he shall issue the certificate only on receiving notice from the Register. All this does not prohibit the resident from making his application to the State before the approved plat has been filed with the Register. The State may dispose of the land it owns in the present or in the expectancy, in such manner as the Legislature may deem proper. Whether the application is made before or after the filing of the approved plat, the applicant's right to the *land* depends on the contingency that the Register shall accept it as part of a grant to the State. When the land has been accepted and the proper State officer notified, it is his duty to issue his certificate to the applicant who first—after approved survey in the field—made application by affidavit in due form.

The "application" by the citizen or resident, and the recognition by the United States officer of title in the State, are not contemporaneous. From the very nature of the proceedings, the rights of all applicants must remain in abeyance until the application has been accepted by the Register; then the right to a certificate attaches in favor of the applicant first in time after the *survey*. No inconvenience, therefore, can arise from according to the statute the meaning heretofore understood by the officers of the State Land Department to be the correct meaning.

The only question here is, which of several applicants was entitled to a certificate, when the State office became authorized to issue a certificate by reason of a notification from the Register that the application for the land had been accepted as portion of a grant to the State.

We find little difficulty in answering. He who filed first after the *actual survey*—the survey in the field—approved by the Surveyor-General.

We are the more thoroughly convinced that the views above expressed are correct from the circumstances, that, under the public land system and practice of the Land Department of the United States, lands have always been treated as *surveyed* when the lines were run in the field and monuments or marks established by the proper surveyor.

By the Act of Congress of March 3, 1853, (1 *Lester* p.207, sec 6,) the general preemption law of September 4, 1841, was first extended over California. (1 *Lester's Land Laws*, pages 61 to 63, sections 10 to 15 inclusive.) This law allowed preemptions *only on surveyed lands*, and in the eleventh section is the following clause: "When two or more persons shall have settled on the same quarter section of land, the right of preemption shall be in him or her who made the first settlement."

After this law was passed, it became necessary to settle the question when lands of the United States should be "treated as surveyed," and on the 15th of September, 1841, the Commissioner of the General Land office issued his circular to Registers and Receivers of the United States Land Offices, upon this point, as follows: "The approval of the plat is the evidence of the legality of the survey; but in accordance with the spirit and intent of the law, and for the purpose of bringing the settler within its provisions, the land is to be considered as surveyed when the requisite lines are run in the field and the corners established by the Deputy Surveyor." (1 *Lester*, page 364.)

Hence, whenever a map of the survey of a township is filed in the United States Land Office, descriptive field notes of the survey of said township are required to be filed with said map, (see 1 *Lester*, pages 722-724, for map and instructions); and in case a contest arises between two settlers who settled on the land after the survey and before the map was filed in the Land Office, the Register and Receiver can refer to the map and descriptive field notes, and ascertain when the land was surveyed in the field, and which of the two settlers first settled after said survey in the field, so as to award the land to

the first settler, in accordance with the eleventh section of the Act of September 4, 1841, and the Commissioner's instructions of September 15, 1841. (*Lester*, 364.)

The seventh section of the Act of Congress of May 30, 1862, (2 *Lester*, p. 48), has the following: "That in regard to settlements which *by existing laws*, are authorized, in certain States and Territories, upon unsurveyed lands, which privilege is hereby extended to California," etc.

In the existing laws referred to above are the following: "That if, when said lands are *surveyed*, it is found that two or more persons have settled upon the same quarter section, each shall be permitted to enter his improvement, as near as may be by legal subdivision." (1 *Lester*, 238, No. 255). Here then the Register and Receiver have to refer to the map and descriptive field notes of said land, to see if both or all of said settlers, claiming the same quarter section of land under said law, actually settled before the survey of the land in the field, or if one or more of them did not actually settle after the survey of the land in the field, when the lines and corners of the sections were clearly defined on the ground, and as a consequence whether their settlement was not in violation of law, and a fraud on the first settler who actually settled before the survey of the land in the field.

The act of Congress of February 26, 1859, has the following: "That where settlements, with a view to pre-emption, have been made *before the survey of lands in the field*, which shall be found to have been made on sections sixteen or thirty-six, said section shall be subject to the pre-emption claim of said settler," etc. (11 *U. S. Statutes*, 386; 1 *Lester*, 396-308, No. 353.)

In Zabriskie's *Land Law's of the United States* is the following: "The State acquires a right to all the 16th and 36th sections immediately after such survey *in the field* has been made as will enable a person to determine the locality of said sections." (Pages 493-494.)

In the *General U. S. Land Office Report for 1871*, on page 35, is the following: "As soon as, in running the lines of the public surveys, the school sections *in place* are fixed and determined, the appropriation thereof for the educational object is, *under the law*, complete, except where they are found to be covered by prior adverse rights."

Thus it will be seen that under the law and the instructions of the Commissioners of the General Land Office, and the practice of the Land Department of the Government of the

United States, lands are treated as surveyed "*when the requisite lines are run in the field, and the corners established.*"

We think that the conclusion of the Court below that the application of Linebaugh was void, was erroneous.

Judgment reversed and cause remanded. Remittitur forthwith.

We dissent.

CROCKER, J.
RHODES, J.

[No. 6033.]

[Filed April 29, 1878.]

CITY OF STOCKTON vs. CLARK.

Appeal from Fifth District Court, San Joaquin County.

———, Judge.

STREET ASSESSMENT.—A notice inviting sealed proposals for street work, under the re-incorporation, act of Stockton, and not containing a reference or diagram and specifications, as required by the act;—*Held* that the proceedings are invalid, and property is not liable for an assessment based thereon.

STATEMENT OF FACTS.

This was an action brought by the City of Stockton as plaintiff, to recover an assessment made against Asa Clark and his property, Lot 1, Block 165, east of Centre street, defendants, for re-grading and graveling Hunter street, between Fremont and Flora streets.

The City Council, at a regular meeting on June 2, 1873, resolved an intention to order the work done, and fixed the evening of June 16, 1873, at the Council Chamber for hearing objections, etc., and ordered publication of notice, which was done on June 4th, and till the 16th, in the "Daily Independent"—but did not by resolution authorize any survey or estimate of the work done. But the City Surveyor made a survey, with maps, diagrams, and estimates, without any order, and filed in the City Clerk's office, and which were endorsed as having been approved and ordered filed by the Council on June 2, 1873. All other proceedings following appeared to be in order, finally showing a delinquent assessment against said Clark and his lot, of \$80.27 and which he not paying, the City sued for judgment for that amount and costs.

The cause was argued September 6, 1877, and findings being waived judgment was rendered for defendant, for his costs, \$5.40. The ground of the decision was the omission of the Council to "make and file a preliminary survey," and to refer, in the "Notice to Contractors," to the diagram and specifications on file,—rendering all subsequent steps void. Appeal from the judgment was taken March 11, 1878.

Jas. A. Louttit, attorney for plaintiff and appellant.

W. I. Dudley, attorney for defendants and respondent.

OPINION BY THE COURT.

The notice inviting sealed proposals did not refer to a diagram and specifications of the proposed work, as required by the twenty-seventh section of the Act of March 27th, 1872, to reincorporate the City of Stockton, and for that reason the proceedings are invalid, and the defendant's property did not become liable for the assessment.

Judgment affirmed; remittitur forthwith.

[No. 6011.]

[Filed April 29, 1878.]

CITY OF STOCKTON vs. SKINNER.

Appealed from the Fifth District Court, San Joaquin Co.

_____, Judge.

STREET—ASSESSMENT.—A subsequent resolution being passed by the City council of Stockton, under the re-incorporation act, and duly entered on its Journal, with reference to a survey, diagram, and specifications before made by the City surveyor and filed with the Clerk;—*Held* that it was tantamount to a prior direction to the officer to make such survey, etc.,—and was equivalent in law to their adoption.

STATEMENT OF FACTS.

This action was brought by the City of Stockton plaintiff, against J. W. Skinner and his property Lot No 2. in Block 96, east of Centre Street as defendant, to recover for an assessment made for grading Hunter Street in front of said Lot, etc. The proceedings were the same in all particulars as in the preceding case of Asa Clark, excepting only, that the same contractor having failed to perform the work, the City Council, by resolution on October 20th 1873 directed the Clerk to re-advertise, the work which resulted in a contract, and completion of the work, and an assessment of the cost upon the lots, of which the above lot was delinquent for \$195.85. All these last proceedings since October 20th 1873 were immediately and duly entered on the City Journal, and signed by the Mayor, the presiding officer. Cause being tried September, 6th 1877, and findings waived, as in the former case, judgment was rendered for defendant as before, and appeal taken on same day, and same ground as in case of Asa Clark.

Jas. A. Louitt attorney for plaintiff and appellant.

W. L. Dudley for defendant and respondent.

OPINION BY THE COURT.

The resolution of the City Council of October 20, 1873, admitted to have been duly entered on its journal, was equivalent in law to an adoption of the survey, diagram and specifications before them made by the City Surveyor and filed

with the Clerk, and was tantamount to a prior direction to the City Surveyor to make said survey, diagram, estimates and specifications.

Judgment reversed and cause remanded, with an order to the Court below to enter a judgment for the plaintiffs upon the admissions of the pleadings in connection with the agreed statement of facts. Remittitur forthwith.

[No. 6001.]

[Filed April 29, 1878.]

CREIGHTON vs. EVANS.

Appeal from Thirteenth District Court, Tulare County.

J. B. CAMPBELL, Judge.

DAMAGES.—DIVERSION OF WATER COURSE.—A party diverting the water of a stream, or any portion of it, from its natural channel, for his own use,—he not being a riparian owner—is liable to at least nominal damages to the party from whom it is diverted, and who owns the land through which it naturally flows,—even though he has suffered no actual damage.

INSTRUCTIONS TO JURY. That a *portion* of water might be thus diverted, if for domestic use, and if enough be left for domestic use, and watering stock of the party from whom diverted, though not causing damage,—is erroneous.

STATEMENT OF FACTS.

This is an action for damages brought by the plaintiff against defendants, on April 17, 1877. Plaintiff, J. M. Creighton, owning certain lands in Tulare County, situated on "Elk Bayon" or "Tulare River"—a public stream—claimed to have on them 600 head of cattle, and 600 hogs, and a large number of fruit trees, and grape vines, and seventy-five acres alfalfa, all of which were watered by said stream—and complains that on February 25, 1877, defendants, Dudley Evans, D. K. Berry, Alonzo Berry, and Henry Mehrling, built a dam across the stream, diverting its waters, causing plaintiff's fruit trees and vines to die, crops to fail, stock to become poor, and many head lost, etc., damaging him \$2,500, for which he asks judgment, and removal of the dam, and a perpetual injunction.—Defendants admit a small dam about fourteen inches, across a part of the stream above plaintiff's land,—did not divert all the stream (but only about one-third). Otherwise makes a full denial. Tried by jury September 18, 1877.—Judgment for defendant, and costs, \$190.25. Stay granted for twenty days. Motion for new trial denied, and appeal taken February 2, 1878, from the judgment, and order denying a new trial, and order denying an injunction.—The instructions to the jury bearing upon the verdict appear sufficiently in the opinion.

Atwell & Bradley, attorneys for plaintiff and appellant.

E. J. and E. D. Edwards, attorneys for defendants and respondents.

OPINION BY THE COURT.

It is admitted by the pleadings that the water of Elk Bayou flowed in its natural channel through the plaintiff's land, and that the defendant devoted a portion of the water to his own land for purposes of irrigation, and other purposes. It is not averred that he is a riparian owner, and as such entitled to use any portion of the water. There is nothing in the record to indicate that the plaintiff was entitled to divert any portion of the water, and the Court properly instructed the jury that the plaintiff was entitled to recover at least nominal damages, even though he had suffered no actual damage. But, at the request of the defendant the Court also instructed the jury that if the defendant diverted a portion of the water for a useful purpose—such as, for example, for domestic use—and that enough water was left in the stream for the use of the plaintiff for watering his stock and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendants. This was not only contradictory to the first instruction, but is erroneous in matter of law. So far as appears from the record before us, the defendants were not entitled to divert the water for any purpose and the plaintiff was entitled to at least nominal damages.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 5663.]

[Filed April 20, 1878.]

WENTWORTH ET AL, vs. MILLER & LUX.

Appeal from twentieth District Court San Benito County.

D. Belden, Judge.

CONTRACT—HARVESTED CROP.—The terms of the contract in this case, gave the lessors a lien upon the harvested crops until certain dues and advances were paid.—*Held* that until those dues were paid, the lessors could only hold or dispose of such crops as the servants of the lessees.—*Purchasers* from such lessees could neither acquire nor assert any rights of possession as against such lessors.

STATEMENT OF FACTS.

Miller and Lux, defendants, being owners of certain lands in Fresno County, leased, on October 1st 1874, a tract to A. J. Pool, and one to W. J. McNeil, for one year, for a rent of one-fourth of the crops, The Lessors to furnish all building material, and Lessees to put up all buildings, fences, etc, Lessee to do all irrigating of the lands, with water from the "San Joaquin and Kings River

Canal Company", for which water they pay three-fourth, and Lessors one-fourth the cost. All grain and crops to be removed from the premises by Lessee on or before September 1st each year, Lessors to pay taxes on the land and improvements, and Lessee on his stock and the growing crops. The water bill, and advances made by Lessors, with interest at one per cent. per month, to be paid in gold coin, with a lien upon crops of Lessee, and which crops shall remain in possession of Lessors till paid, and if not paid on or before August 1st, Lessors may sell same, with or without notice, for enough to pay such amounts due.

These leases were not acknowledged or recorded. Under these leases, the said lessees entered, raised crops of wheat and barley, and harvested, and on July 22d, 1875, Pool had delivered the one-fourth part of his wheat as rent to Miller & Lux, and left his own share in the field.

McNeil's crop was mostly cut, but not threshed,—i. e. two stacks of wheat and two of barley. Pool this day executed to Messrs. Wentworth & Osborn, the plaintiffs, a bill of sale for over 50,000 pounds (400 sacks), of wheat in payment for \$750 on a promissory note for \$900. He orally delivered the sacks of grain to Osborn, who marked them "W. & O." and placed in charge of McNeil. At the same time McNeil was indebted also to Wentworth & Osborn \$1,000, for which he gave bill of sale of the two stacks of wheat and two of barley, orally delivering them to Osborn, who placed them in charge of one Fain.

At this time, Pool was indebted to Miller & Lux for advances, over \$2,000; and McNeil was so indebted over \$2,500. On July 27th, Pool settled accounts with Miller & Lux, and gave them a bill of sale for 1020 sacks of wheat, and certain farming implements, for amount of \$2,416.76. On August 4th, defendants learned from Pool of his sale of the 400 sacks of wheat to plaintiffs, and they at once took all the wheat to their warehouse, under protest from McNeil, who was still in charge for Wentworth & Osborn. Before defendants took the stacks of grain from the McNeil field, they obtained from him a bill of sale of all his interest in them,—this bill of sale being subsequent to the one given to Wentworth & Osborn by him. The value of the wheat on the Pool tract proved to be \$696: the wheat and barley on the McNeil place \$1,050. Case was tried August 10th, 1876, jury waived, and judgement for plaintiffs for \$1,662.63 and costs,—\$38.20. The sum of this judgement made up as follows: 1st.—For the 400 sacks of wheat from the Pool tract, \$696; 2d.—For the wheat and barley from the McNeil tract, \$1,050, less \$49.84, cost of threshing,—\$1,000.16. Then less the one-fourth for rent, \$250.04, leaving a balance of \$750.12; total, \$1,446.12 with interest from September 1st, 1875. Judgment recorded February 27th, 1877; Motion for new trial, and denied, upon which bill of exceptions was filed May 14th, 1877, and appeal taken April 7th, 1877, from the judgment and the order denying a new trial.

N. C. Briggs and *J. J. May* attorneys for plaintiffs and respondents.

W. S. McPheeters attorney for defendants and appellants.

OPINION BY THE COURT.

Whatever may be the character of the instrument recited in the findings and denominated a lease, it is clear that by the

terms of the contract, the grain after it was cut was under the control of defendants, and in so far as it was in possession of the lessees, so called, was in their possession simply as servants of defendants.

The purchasers from the lessees acquired no other or greater interest in the grain than that of the parties named as lessees and could assert no right to the possession as against the defendants.

Judgment and order reversed and cause remanded. Remittitur forthwith.

[No. 5968.]

[Filed April 29, 1878.]

CHIDESTER

vs.

CONSOLIDATED PEOPLE'S DITCH CO.

DAMAGES,—NEGLIGENCE,—INSTRUCTIONS.—Damages being claimed by plaintiff for the overflow of water from defendant's ditch, running through his land, the court instructed the jury that defendant was responsible for injury resulting either directly or remotely from his negligence. *Held*, that this was erroneous as to injury resulting remotely,—as recovery can only be had where negligence is the *proximate* cause. Also *held*, that another instruction given, tending to cure this, produced a contradiction which made it impossible to determine on which of them the jury acted.

Appeal from Thirteenth District Court, Tulare County,
J. B. CAMPBELL, Judge.

STATEMENT OF FACTS.

The plaintiff Samuel B. Chidester, owning 280 acres of land, which he uses for agricultural and grazing purposes, and through which runs the large water ditch of the "Consolidated People's Ditch Co." brings action for damages for the overflow of the ditch, carrying away his fences, gullying his land, and depositing coarse sand upon it, etc.—through neglect to repair the ditch. Claims damages in three separate counts, for three different years, between November 24th and July 15th each,—amounting to \$1,174.99. Defendant claims he is prevented by plaintiff from going upon his land to do repairs, through threats and menaces, thus constituting contributory negligence;—that it has run through plaintiff's land for more than ten years, and that cause of action is barred by sec. 318 C. C. P.

Tried by jury on January 23, 1877, and verdict for plaintiff for \$600, and costs \$337.50. Defendant appeals from the judgment, January 7, 1878, on a bill of exceptions for review,—urging that the Court gave no charge to the jury—only

instructions, at the request of the contestants, which were contradictory,—hence ground for a reverse of judgment.

W. W. Cross, and Atwell & Bradley, attorneys for plaintiff and respondent.
Brown & Daggett, attorneys for defendant and appellant.

OPINION BY THE COURT.

By the fourth instruction given at the request of the plaintiff, the Court instructed the jury that for any injury to the lands of the plaintiff, caused by the overflow of the waters entering the defendant's ditch, "resulting either directly or remotely from the negligence of the defendant in not keeping the same in good repair, or in the manner of its use while under defendant's exclusive control, defendant is responsible for such damages as he has sustained by reason thereof."

This instruction is erroneous, in so far as it declares the defendant to be responsible for damages resulting "remotely" from the defendant's negligence. The law is well settled that in actions for negligence the damages to be recovered are only those of which the negligent act is the proximate cause. The maxim applicable to such actions is "*causa proxima, non remota spectatur*," *Shearman & Redfield on Negligence*, secs. 9-595, and cases there cited. See also *Civil Code*, sec. 3333. If it be claimed that the error in this instruction was cured by the first instruction given at the request of the defendant, the answer is that the two instructions are in this particular contradictory, and it is impossible to determine on which of them the jury acted. *People vs. Campbell*, 30 *Cal.*, 312; *Brown vs. McAllister*, 38 *Cal.*, 573; *People vs. Anderson*, 44 *Cal.*, 65.

Judgment reversed and cause remanded for a new trial.
Remittitur forthwith.

[No. 5462.]

[Filed April 22, 1878.]

SMITH vs. LAWRENCE.

Appeal from Twelfth District Court, San Francisco,

This being the second appeal in the same cause.

DAINGERFIELD, Judge.

FINDINGS—WAIVER.—The findings of fact not being filed, and it not appearing in the bill of exceptions that they had not been waived,—the appellant could not avail himself of the error as a ground for a new trial.

STATEMENT OF FACTS.

E. A. Lawrence, the defendant gave to D. P. Smith, plaintiff, a promissory note for \$200, on January 30, 1858, payable one day after date, with interest at

two and a half per cent. per month;—and on February 18, 1858, another note of same amount, on demand, with interest.

The payment of these notes was assumed by one Austin W. Hammitt in a written contract between him and Geo. E. Parnelee of New York City, (by the said Lawrence as his attorney in fact), on April 15, 1858, together with the payment of an additional note given to Lawrence of \$378,—all as purchase money consideration for 129 acres of land, a part of the "Romero Rancho," in Contra Costa County, and Hammitt to have a conveyance for the land soon as said payments be made, etc. Plaintiff agreed to forbear suing on said two notes, until the decision of the title of the "Romero Rancho," then pending in the United States District Court. On February 28, 1864, said title was declared invalid by the United States Supreme Court.

Hence, he now demands judgment for the amount of said two notes, \$460, and interest,—April 25, 1867. Defendant denies the allegations of the plaintiff, and avers that notwithstanding the "Romero Rancho" title is not perfected, yet, Hammitt is still in possession and occupation of the land, and has not yet abandoned the contract, and that his title was perfected by act of Congress of May 5, 1854, and also Act of July 23, 1866; and that he, Hammitt, has a patent for the land now pending; and further that Smith by written contract agreed to accept Hammitt (his brother in law) in place of Lawrence in the payment of the notes. Also claims this suit is barred by lapse of time—four years.—Case tried February 23, 1875 without jury—and judgment for plaintiff, for \$2,446.25, and costs \$565.55. Motion for new trial on ground of newly discovered evidence, etc. Motion granted on the ground of failure of the Judge to file findings, and that they had not been waived, upon which plaintiff appeals from the order, November 17, 1876.

E. B. and J. W. Mastick and Crockett, Whitney & Naphthaly, attorneys for defendant and appellant.

E. A. Lawrence, in propria persona for defendant and respondent.

OPINION BY THE COURT.

The court below granted the motion for a new trial, upon the assumption that it appeared in the settled statement that findings of fact had not been waived. In this it was mistaken. The only allusion to that matter is found in the eleventh assignment of error, in which the fact of non-waiver is assumed as a basis for stating the alleged error therein set forth.

There is no statement in the body of the bill of exceptions that findings had not been waived, and the fact of such non-waiver is not otherwise, or in any manner, made to appear in the record.

There are no specifications of the particulars in which the evidence is insufficient, and there was no error of law committed at the trial, excepted to by the defendant, such as would entitle him to a new trial. Order reversed. Remittitur forthwith.

[No. 5232.]

[Filed April 29, 1878.]

FROST vs. MEETZ.

Appeal from Third District Court, Alameda County.—

S. B. MCKEE, Judge.

PRACTICE.—MOTION FOR NEW TRIAL.—NOTICE OF.—An acceptance by the respondent, in the settled statement, that appellant has given notice of motion for new trial, includes intention that said notice is given in due time and form. Objection to said notice is also debarred by respondent's failing at the settlement of the statement, to allege want of proper notice, or to object to the settlement on that ground.

MORTGAGE DEFICIENCY.—OFFICIAL ACTS.—The creation of a lien, or its amount, on the general property of a judgment debtor, for a deficiency balance on a mortgage debt, does not depend on the action of the sheriff in the performance of his official duty. Neither the sheriff nor the clerk can adjudge any sum due from a defendant to a plaintiff. A mistake in calculation made by either officer may be brought to the attention of the court by the injured party.

Jennett B. Frost, plaintiff, claiming to be owner in fee simple of land lying in Oakland, by mesne conveyance from one Tinsley, through deed from Gideon Aughinbaugh, of October 15, 1855; brings action in ejectment against defendant, Theodore Meetz,—joined with E. B. Mastick,—who are in occupation. Default being entered against Mastick, Meetz, in answer, claims actual possession for more than five years, and ownership in fee, by written conveyance, and that action is now barred by section 318 and 319, of C. C. P. Produces in evidence the judgment roll of the court, showing that this land, (with other lands,) was legally sold under execution against Aughinbaugh by the sheriff, in January, 1856, to cover a deficiency of \$18,659.70 on a former foreclosure of a mortgage:—also another sale on foreclosure for \$10,000, through both of which sales he derives title, and that the last named foreclosure was complete before the deed was given by Aughinbaugh to Tinsley, through which plaintiff derived title.

Cause tried November 8, 1875, without jury, and judgment for plaintiff, and costs \$23.65. Defendant gave notice of motion for a new trial, on statement of case, and Bill of Exceptions, December 11, 1875. New trial denied, and appeal taken by defendant, on May 26, 1876. The decision now rendered is upon a rehearing.—The proceedings upon the executions and foreclosures against Aughinbaugh, as introduced in evidence by defendant are understandingly shown in the opinion.

Jennett B. Frost, in pro. per. and *Z. Montgomery*, attorneys for plaintiff and respondent.

H. H. Haight & E. R. Taylor, attorneys for defendant and appellant.

OPINION BY THE COURT.

The statement and bill of exceptions on motion for a new trial were settled by the Judge of the Court below on the 9th day of February, 1876, and on the 31st of March following the

motion for a new trial was denied. It is now contended by the respondent that the right to move for a new trial in the Court below had been lost, by a failure to give the required preliminary notice of intention to move for such a new trial.

But we think that this objection is not open to the respondent. The statement as settled sets forth (folio 123) that the defendant *had given the notice*—"And the defendant Meetz having given notice of his intention to move for a new trial," etc., and by this will be intended a notice given in due time and form. Nor is the position of the respondent upon this point aided by a resort to the affidavits found in the printed transcript on file here. For if those affidavits be taken to be part of the record on this appeal, there is found the uncontradicted allegation by the counsel for appellant, that the respondent appeared at the settlement of the statement, proposed amendments thereto, and did not then allege the want of proper notice of intention to move for a new trial, nor object to the settlement of the statement on that ground.

The decision denying the motion for a new trial, made below, does not appear to have proceeded upon the supposed want of notice of intention, but upon the determination of the questions presented by the motion itself. The intendment to be indulged here therefore is that the Court below found that the respondent had waived the objection.

2. The judgment and proceeding in *Moss vs. Aughinbaugh* were substantially like those in *Hepburn vs. Chipman*, considered in *Hibberd vs. Smith* (50 Cal. 518,) and those in *Drexel, Sather & Church vs. Aughinbaugh*, commented on in *Chapin vs. Broder* (15 Cal., 421.)

In the cases referred to it was held, in effect, that the return of the Sheriff, showing the sum for which the mortgage premises had been sold, authorized the clerk to issue execution against the general property of the judgment debtor for the balance of the mortgage debt, and that the docket of the judgment, made prior to the *return*, constituted a lien on the general real estate of the defendant from the filing of the *return*.

Much stress was placed in argument upon the circumstances that the record in *Moss vs. Aughinbaugh* contains no formal report of the deficiency, and it is urged that the failure of the Sheriff to make the subtraction and report the balance, deprived the judgment creditor of the benefit of his lien on the

general real estate of the debtor- But the creation of the lien or its amount did not depend on the action of the Sheriff, whose duty was simply to perform the acts required of him by law.

Section 246 of the Practice Act of 1851, reads: "In an action for the foreclosure or satisfaction of a mortgage of real property, or the satisfaction of a lien or incumbrance upon property, real or personal, the Court shall have power, by its judgment, to direct a sale of the property, or any part of it; the application of the proceeds to the payment of the amount due on the mortgage, lien or incumbrance, with costs, and execution for the balance." Prior to 1860, when section 246 was amended, there was no provision for the docketing of a deficiency, but the docket of the judgment in a mortgage foreclosure had no effect until the return of the Sheriff on the order of sale, when a lien attached by reason of the previous docket, for the amount of any balance uncollected by sale of the lands mortgaged. But section 246 as it stood originally did not require any formal report of sale showing in terms the amount of a deficiency, to be approved by the Court, or any such reports, nor did the amendment of 1860 require anything more than the return of the Sheriff of the amount for which the mortgaged premises had sold. The words of the amendment are: "*If it shall appear from the Sheriff's return that there is a deficiency of such proceeds and a balance still due to the plaintiff, the judgment shall then be docketed for the balance, etc.*" Such is the law at present in this respect.

Of course, neither the Clerk nor Sheriff can adjudge any sum due from a defendant to a plaintiff. The authority of each extends to the mere matter of computation, and it can in no way affect the substantial rights of either party to the action, whether the subtraction is made by the Sheriff or Clerk. If either of these officers make a mistake in the calculation, the party injured by the error may call the mistake to the attention of the Court.

That the figure *five* was inserted by mistake for the figure *six* in the Sheriff's deed to J. Mora Moss, is apparent on an inspection of the instrument.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

JUST RECEIVED.—Additional numbers of the "*Advance Sheets*" of the "*Ohio State Reports*," from Messrs. Robert Clarke & Co., Cincinnati.

Supreme Court Unwritten Opinions.

[No. 5428.—Decided April 20, 1878.]

C. J. FLATT, Plaintiff and Appellant.

vs.

C. C. ROHRLE, Defendant and Respondent.

Appeal from Third District Court, San Francisco.

S. B. MCKEE, Judge.

EJECTMENT.—Time allowed by law, after publication, must expire before forfeiture of lands for delinquent payment can be declared.

STATEMENT OF THE CASE.

Plaintiff brought action in the Nineteenth District Court, E.D. Wheeler, Judge, on October 7, 1873, for recovery of four lots of land in the "Silver Terrace Homestead" of San Francisco, and on November 24, 1873, an order was made transferring cause to Third District Court for trial. The said Homestead Association on May 3, 1869, held a premium sale of its lots, at which defendant bought the four lots in question and paid a *premium* of \$560, and on June 3d, received a certificate of purchase, conditional upon further monthly instalments,—less the average premiums on the shares,—arising from previous sales.—Defendant then took possession, and has so continued, and claims to have made improvements worth \$5,000, or more. On May 4, 1870, the defendant paid to the President of the Association \$500, and demanded a deed to the lots. The President took the money, but finding the Association could not make a deed, returned \$233.12 of the \$500. On January 26, 1871, instalments for eight months being due and unpaid, the defendant's stock was declared delinquent, and a notice was published in the *Examiner*, from January 26, 1871, to February 26, 1871; and on March 3, 1871 (before ten days after such publication had expired) the Board declared the stock forfeited, and ordered it sold at auction, which was done on April 3, 1871, to the plaintiff, who was the secretary of the Association;—and on May 29, 1873, the Board made a deed to him under which he now claims title, and brings this action, and claims damages \$500, and for loss of rents and profits \$500 more. Case was tried without jury,—and judgment given for defendant, May 12, 1875,—on the ground that forfeiture of the stock of defendant was illegal, as the time required, (ten days) after publication had

not expired. Motion for new trial, denied, and appeal taken on October 5, 1876, from the judgment, and order denying new trial. Judgment and order now affirmed.

M. A. Wheaton, attorney for plaintiff and appellant.

A. M. Heslep and *Johnson & Johnson*, for defendant and respondent.

Lamar & Johnson, for respondent.

[No. 5888.—Decided April 19, 1878.]

G. A. BOTSFORD, Plaintiff and Respondent,

vs.

MARK HOWELL ET AL, Defendant and Appellant.

Appeal from Thirteenth District Court, Tulare County,
J. B. CAMPBELL, Judge,

SWAMP LAND PURCHASE.—State Controller's warrants of indebtedness for a Swamp Land District, not applicable as payment on swamps lands not located in same district.

STATEMENT OF THE CASE.

This is a contest upon the right to purchase from the State 2,000 acres of swamp land in Tulare County.

On April 7, 1870, Mark Howell, defendant, filed his proper application and affidavit, and within thirty days after, a survey was made by the County Surveyor, and papers sent to Surveyor General who approved October 27, 1871, and returned same to the County Surveyor's office. Within fifty days Howell presented to the County Treasurer a copy of survey and approval in order to pay for same in gold coin, when he was informed by the Treasurer and Surveyor that all of said land was in Swamp Land District, No. 48, which had outstanding warrants for indebtedness, and which were as good for the purpose of payment as gold coin. Thereupon, Howell, relying upon such representation as *true*, did purchase warrants, and with them pay twenty per cent. of purchase price, and one year's interest, the same as though with coin, and received his certificate of purchase November 28, 1872. Howell sold and assigned the certificate December 1, to Geo. D. Roberts, who sold same to Latham & Dore, who hold as *bona fide* purchasers.

Now on December 8, 1873, the plaintiff Botsford filed an application for same land in the County Surveyor's office, and he, without actual survey, sent a copy of the field notes and

plat of survey of former surveyor to the Surveyor Gen. for approval—on January 8, 1874, (who refused approval), and on June 5, 1875, made demand that the Surveyor General should refer the matter in contest to the State Courts, which was done on October 28, 1875.—Plaintiff claims that Howell never paid the twenty per cent. of purchase money or interest, but had by fraudulent representation to the County Treasurer, induced him to receive warrants as payment thereon.—That the lands are not in Swamp Land District, No. 48, or *any* swamp land district; and asks decree of Court declaring the certificate held by Howell void, and that it be recalled, and he, plaintiff, be authorized to purchase the land.—Action tried June 13, 1877, without jury;—and judgment for plaintiff, on the findings that the land was not in swamp land district No 48. and the warrants paid by Howell, not lawful payment on the certificate, hence Howell's application and certificate void, and Botsford entitled to purchase the land.

Defendants then moved for additional findings and conclusions of law, which was denied. Motion for new trial also denied. Appeal taken by defendants on October 12th 1877 from the judgement, and the order denying new trial, and additional findings.

Judgment and order affirmed. Remittitur forthwith, *Stewart and Greathouse*, and *Henry Edgerton*, attorneys for plaintiff and respondent.

Sawyer and Ball, attorneys for defendants and appellant.
Brown and Daggett counsel.

NEW ALLOTMENT OF JUSTICES OF U. S. SUPREME COURT.
—There having been an Associate Justice of this Court appointed since the commencement of this term, it is ordered that the following allotment be made of Chief Justice and Associate Justices: First Circuit, Nathan Clifford, Associate Justice; Second Circuit, Ward Hunt, Associate Justice; Third Circuit, William Strong, Associate Justice; Fourth Circuit, Morrison R. Waite, Chief Justice; Fifth Circuit, Joseph P. Bradley, Associate Justice; Sixth Circuit, Noah H. Swayne, Associate Justice; Seventh Circuit, John M. Harlan, Associate Justice; Eighth Circuit, Samuel F. Miller, Associate Justice; Ninth Circuit, Stephen J. Field, Associate Justice.

Supreme Court Quarters, at Los Angeles, are being rapidly prepared by clerk D. B. Wolf, Esq.

CALIFORNIA LEGAL RECORD.

VOL. I.

MAY 25, 1878.

No. 9.

Legal Notes.

THE REPEAL OF THE BANKRUPT LAW.—The repeal of the Bankrupt Law appears at last to be assured, and Congress has done wisely in fixing the operation of the repealing Act at as early a date as possible. The time already expired since the bill was introduced, has been so well employed by intending bankrupts, that it may be doubted whether every one who wishes to fail, will not be able to do so before the first of September. This, however, is not a very serious objection. The real urgency of the repeal arises from the tendency of the time to make fraudulent bankruptcy a sort of recognized pursuit. It would involve no fatal results if every man now in business were allowed to make one fraudulent failure, so long as the business ended there. What is needed, is the setting up of a barrier to the habit of failing fraudulently; a habit which has led to the founding of many considerable fortunes, among people who have nevertheless continued to hold their heads up quite as well as though they had been honest men instead of knaves. The practice of swindling creditors, has of late years become so general, that confidence has almost expired, business has been converted into a mere lottery, and a temptation to follow the examples which have impoverished them, has been continually set before the larger dealers. To put a stop to this by any means, is therefore the prime consideration, and the repeal of the bankrupt law will do it. It is not to be expected that this repeal will do away with all bankruptcy proceedings. The various State laws will take the place of the national law, but as the State laws are framed under a larger responsibility as regards their special fields than can be secured in Congress, it is believed that they will protect the creditors better, and do more to discourage roguery in business. One thing is tolerably certain, namely: that the state of things cannot be worse without a national bankrupt law, than it has been with one.

A MAN CANNOT COMMIT FORGERY by SIGNING HIS OWN NAME.—A decision of the New York Court of Appeals in the case of late Treasurer Mann, of Saratoga county, reverses his conviction of forgery in having signed and issued county obligations without authority. The Court hold unanimously that Mann could not be convicted of forgery in signing his own name to the instrument claimed to have been forged; that the instrument purported to be, and was in fact, his act, and that its invalidity, if it were invalid, depended upon a want of authority to make it. Under this decision County Treasurers issuing unauthorized bonds cannot be prosecuted for forgery in affixing their official signature to bonds.

A queer case came lately before a French Court. A peasant had agreed to pay another 500 francs for a cow, and the purchaser placed on a bench twenty 20-franc coins and a 100-franc bill. Before the seller could count the coin, the cow had made a snatch at the bill and swallowed it. The question was, who was to lose, and the Judge decided that the buyer, who had held the cow by a halter when it devoured the bill, had not taken proper precautions, and must pay it over again.

The upper story of the new Hellman-Mascarel Block, in Los Angeles, has been selected for the quarters of the Supreme Court. A suite of ten rooms is to be finished off according to the requirements of the Court, and for this the rental will be \$150 per month.

GREAT SUIT BEGUN—Pittsfield, (Mass.) May 21st.—The great suit of the Lennox Plate Glass Company against William E. Dodge, of New York, to recover damages to the amount of \$600,000, was begun in the Supreme Court this morning.

Hon. Daniel Gant, Chief Justice of Nebraska, recently died of dropsy, in Nebraska City.

Supreme Court of California.

[April Term, 1878.]

[No. 5773.]

[Filed April 30, 1878.]

TEMPLE vs. ALEXANDER, SHERIFF.

Appeal from Seventeenth District Court, Los Angeles Co.—
SEPULVEDA, Judge.

REPLEVIN—REMOVAL BY STIPULATION—INTERVENTION.—Had the action proceeded to judgment without intervention of other parties,—*Held*, that a judgment in *form* against the Sheriff could not have been enforced against him. The effect of the *stipulation*, as united in by all the parties was to place the property in their joint keeping, and thus to relieve the Sheriff from the accounting for its value;—nor did the "*intervention*" change the responsibility in that respect.

Held, further, that the "*intervention*" was in reality a *substitution* of the real parties for their representative, and their succession was subject to the terms of the stipulation. Hence, the judgment, while correct in *form*, should contain a perpetual stay of enforcement as to the defendant's property.

STATEMENT OF FACTS.

This is an action in replevin,—commenced by A. M. W. de Temple, the mother and guardian of John and Lucinda Temple, minors, for the recovery of 467 head of cattle, which were levied upon by D. W. Alexander as Sheriff, under a writ of attachment issued in the suit of A. B. de Baker vs. Temple & Workman. After the said levy was made, and this action commenced, another action was commenced against the defendant by E. F. Spence, and D. Freeman, as assignees of Temple & Workman for the possession of the same cattle. In the trial of the cause, there also appeared in Court Geo. E. Long, Intervenor, an Assignee in Bankruptcy of F. P. F. Temple, and Temple & Workman, by A. W. Hutton as attorney; and John and Lucinda Temple, Interveners by Wm. Temple their guardian *ad litem*, and by Howard, Brosseau & Howard their attorneys. A stipulation was entered by all the parties that the cattle should be taken in charge by Freeman & Spence assignees, subject to final judgment in this case; and for purposes of trial, all of said actions be consolidated.—The cattle were so delivered on May 17, 1876, and they (F. & S.) afterward sold them without consent of the other parties, and have not accounted for the proceeds. At the calling of the case for trial, the action of F. & S. vs. Alexander was dismissed on motion of plaintiff, (F. S.) judgment was rendered in favor of John & Lucinda Temple, for the recovery of the cattle, or their value \$5,604, and damages \$1, and costs \$76.60 to them and A. M. W. de Temple on June 26, 1877.

Defendant appealed from the judgment August 23, 1877;—urging, among others, the point that *q/ter* the property had been turned over by defendant, by the stipulation, Temple was adjudged a bankrupt, which worked to dissolve the attachment by which defendant held the cattle.

The judgment was affirmed from the bench on November 27, 1877.

A petition for rehearing was filed December 13, 1877, urging that, at the time of the *intervention* of the parties to whom the cattle were finally adjudged,—and ever since—defendant had not possession of the cattle; and that the Interveners should have made Freeman & Spence parties defendant, and they F. & S. are liable if any one, in recovery.

"Rehearing granted upon the question whether the judgment to be entered "on the findings should be against the Sheriff, or Freeman & Spence, or either "of them." Upon this F. & S. made the point that they were never parties to the action, either in the Court below or on appeal; and that their *possession* was by stipulation of the plaintiff in the action,—and consent of all other parties in interest. And further that they held, and disposed of, the cattle under order of the U. S. District Court.

V. E. & F. H. Howard, attorneys for plaintiff and respondent.

Thom & Ross, attorneys for defendant and appellants.

OPINION BY THE COURT.

Had the action of A. M. W. de Temple against the Sheriff proceeded to judgment without the appearance of other parties in the controversy, it is clear that while she might have recovered a judgment *in form* against the Sheriff for the return of the cattle in controversy, she could not have enforced such a judgment against him. The stipulation of May 15th, united in by all the then parties to the action, was intended to remove the property from the custody of the Sheriff and place it in that of keepers selected by the parties themselves, and the effect of the stipulation, followed by delivery of the property pursuant to its terms was equivalent to a turning over of the property by consent to the keeping and control of the parties to the action themselves, in which case it could hardly be claimed that the Sheriff was still to account for its value.

2, Nor do we think that the "*intervention*," so-called, of John and Lucinda Temple, subsequently made in the cause, operated a change of responsibility of the defendant, Sheriff, in that respect. The stipulation was still permitted to remain without objection from any quarter, and the custody of the property provided for by it was not altered or disturbed. The appearance of the new parties, John and Lucinda Temple, was not by the way of *intervention*, though it was so denominated, but in reality, by way of substitution. The action had

been originally brought by A. M. W. de Temple, their mother, who did not pretend to claim for herself, but only as the representative of her children, John and Lucinda, and as having the custody of the cattle, as their property. When therefore, the children by their guardian *ad litem* appeared upon the record as parties litigant, they were but substituted for the then plaintiff, A. M. W. de Temple, who became thereby superseded and practically dismissed from further participation in the cause as a party thereto. As substitutes for her, and as being her successors upon the record, the new parties took up the controversy in the condition in which they found it, and subject to the terms of the stipulation referred to.

It results from this view that the judgment in favor of John Temple and Lucinda Temple, in form entered against the defendant, was correct, but there should have been added thereto a direction that the enforcement of the judgment against the property of the defendant, be perpetually stayed.

Judgment reversed and cause remanded for further proceedings in accordance with the opinion, including the appropriate disposition of the property or its proceeds.

[No. 6010.]

[Filed May 1, 1878.]

BANK OF SAN LUIS OBISPO vs. JOHNSON.

Appeal from First District Court, San Luis Obispo County,—

E. FAWCETT, Judge.

MORTGAGE FORECLOSURE.—The mere failure of the mortgagor to pay the stipulated interest as it accrues, does not necessarily countenance the idea that the principal sum also becomes due by such failures.

In this case the principal sum was not due, by the terms of the note, till two years after date, and the mortgage stipulations were not inconsistent with that:—Hence, *heli*, that the limiting of the foreclosure to so much as *is due* satisfies the terms of the mortgage provisions.

STATEMENT OF FACTS.

This is an action in foreclosure of mortgage. Chas. H. Johnson, defendant and appellant, gave his note on February 2d, 1875, to the Bank of San Luis Obispo for \$5,000,—payable in two years, without grace, with interest at one per cent. per month, payable monthly, and if not so paid, the interest to become a part of the principal, and bear interest at the same rate until paid. This note was secured by a mortgage on three parcels of land amounting to 481 acres; the defendant agreeing to pay all taxes, etc., and in case of default in the payment of the note or interest, plaintiff might, at option, foreclose the

mortgage, and the costs and expenses of same to include counsel fees at the rate of five per cent. on the amount of the debt.

The interest was paid monthly till October 2, 1875, after which it was not, and this suit was commenced by plaintiff October 25, 1876, for default of its payment, and before the *principal* became due. Defendant filed an amended demurrer on January 9, 1877, which was overruled. No answer was made by defendant, and judgment was rendered for plaintiff, on January 17, 1877, for \$6,107.66, and a decree of foreclosure and sale of the premises. On January 23d, the Bank procured a certified copy of the judgment, upon which as sufficient authority, the Sheriff proceeded to sell the premises,—which were bid off by the bank for \$3,000, leaving a deficiency due on the judgment of \$3,221.63. An execution was then issued on February 17, 1877, and levied on other property of Johnson, which was also sold, and bought in by the bank, for the full balance of the deficiency. On October 8, 1877, the plaintiff becoming doubtful of the validity of the sale, made under the certified copy of judgment instead of a writ, moved to vacate and set aside the sale, and order a new one made, which was sustained, and so ordered. From this order, and the judgment the defendant appealed November 10, 1877.

Mc. D. R. Venable, attorney for plaintiff, also *O. P. Evans*, for plaintiff and respondent.

W. J. & E. Graves, and *J. M. Wilcoxon*, for defendant and appellant.

OPINION BY THE COURT.

"In case of default by the mortgagor in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may at its option either commence proceedings to foreclose this mortgage in the usual manner, or cause the said premises or any part thereof to be sold," etc., is the phraseology of the mortgage; but we find nothing in these words which, by fair intendment, gives countenance to the idea that by the mere failures of the defendant to pay the stipulated interest accruing monthly upon the debt, the principal sum should become due. By the distinct terms of the promissory note delivered simultaneously with the mortgage, the principal sum was not to become due until two years after the date of the note—and the stipulations contained in the mortgage are not inconsistent therewith.

Thus the provision already quoted, to the effect that if default be made in the payment of the note or the interest thereon, the mortgagee may foreclose, etc., is fully satisfied by limiting the foreclosure proceedings to the collection of so much of the interest as may appear to be due. The parties to a loan may, and often do, provide that the principal sum, not otherwise due, may become due by default of the debtor in the payment of interest at stipulated periods of time, but in this instance we do not see that they have done so.

Judgment reversed and cause remanded.

I dissent on the ground that in my opinion on a fair construction of the mortgage, it was the intention of the parties that, on a failure to pay the interest when it became due, the principal should become due at the option of the mortgagee.

CROCKETT, J.

[No. 5943.]

[Filed May 13, 1878.]

SANTA CRUZ RAILROAD COMPANY vs. SCHWARTZ.

Appeal from Twentieth District Court, Santa Cruz County,

D. BELDEN, Judge.

SUBSCRIPTION TO RAILROAD PROSPECTUS.—The preliminary "prospectus" of the company proposed to organize a corporation when a certain specified amount of subscriptions were secured.—*Held* that a *departure* from this scheme, without the consent of any subscriber thereto, operated to release him, at his option, from any further obligations or proceedings therein.

STATEMENT OF FACTS.

This is an action to enforce the payment of a subscription of five shares of the capital stock of the Santa Cruz R. R. Co., by Louis Schwartz, defendant.

Said Schwartz, had signed the preliminary prospectus of the Company for five shares of stock @ \$100, each, but before its organization he gave notice of his desire and intention to withdraw entirely, and did so withdraw,—and refused to sign the articles of incorporation, and never took any part in the business of the corporation.

The directors, on August 7th, 1876, voted an assessment of the full amount on all unpaid subscriptions, and published notice of same, in the "Santa Cruz Sentinel," and defendant was served with a notice of same. After said notice, the board of directors voted to proceed by action to recover, and not by sale of the stock as delinquent.—Defendant demurred—which was overruled. Cause tried without jury, and judgment rendered that defendant was not liable as a stockholder for any assessment upon stocks or shares, and for his costs, \$13.80. Appeal taken from this judgment.

Chas. B. Younger, attorney for plaintiff,

Craig & Kittridge, attorneys for defendants.

In the case of same plaintiff vs. J. W. Towne, defendant and respondent, the same action was taken, and the same proceedings had, and upon the same findings; judgment was rendered for defendant, December 8th, 1876, and with costs \$4.75.—Appeal taken, and decision rendered as below.

OPINION BY THE COURT.

The "prospectus" to which the signature of the defendant was obtained contemplated an organization of the proposed corporation only after securing subscriptions for one hundred and *fifty* thousand dollars. The organization was, however, subsequently, and without the consent of the defendant, effected when subscriptions for only one hundred and *thirty* thousand dollars had been obtained. This was a clear departure from the scheme set forth in the "prospectus" to which the defendant had become a party, and it operated to release the defendant, at his option from proceeding further in the business. Judgment affirmed.

[No. 5942.]

[Filed May 13, 1878.]

SANTA CRUZ R. R. CO. vs. TOWNE.

OPINION BY THE COURT.

The facts of this case are precisely those of the case of *Santa Cruz Railroad Company vs. Schwartz*, just decided, and upon the authority of that case. the judgment rendered for the defendant below must be affirmed. So ordered.

May 23.—On motion of Younger for appellant, and filing of petition for rehearing, a stay of proceedings is granted till same is determined in both cases.

[No. 5940.]

[Filed May 1, 1878.]

HURD vs. BARNHART.

Appeal from Fifth District Court, San Joaquin County.

S. A. BOOKER, Judge.

DAMAGES, MEASURE OF—The charge of the court below had based the measure of damages on the value of the use of the property to the plaintiff while deprived of it; and that said value should be ascertained by a consideration of how he could and would have used it if retained by him.

Held that this was erroneous, that the true rule was the "market value," or what the use of such property could have been procured for.

SPECIAL AGREEMENT—*Held* also that an instruction given at request of plaintiff, requiring the defendant to prove a special agreement for pasturage on land not included in lease—was erroneous.

STATEMENT OF FACTS.

This is an action on an undertaking of attachment brought by Hurd against Barnhart, one of the bondsmen therein, for the sum of \$400 gold coin, that

being the sum mentioned in said bond or the penalty thereof,—for the wrongful issuance, it is *claimed*, of an attachment and a seizure thereunder, of certain cattle, wagons, and other property, attached in the suit of H. D. C. Barnhart vs. C. E. Hurd. Defendant filed an amended answer, denying generally the allegations of the complaint, and further more entered claim for the sum of \$2,474, to a portion of which plaintiff demurred,—plea, the Statute of Limitation.

The plaintiff's demurrer to the amended answer, was sustained by the Court, and a trial of said cause had by jury, which found a verdict for plaintiff in the sum of \$400 gold coin. Defendant gave notice of a motion for a new trial, and filed his statement,—counsel for plaintiff offering to remit the sum of \$204.—The Court intimated that a new trial would be denied if plaintiff's proposition to remit would be filed within three days, which was done.—New trial denied, and defendant appeals from the judgment as also from the order denying the motion for a new trial.

Terry, McKinn & Terry, attorneys for defendant and appellant.

W. L. Dudley, attorney for plaintiff and respondent.

OPINION BY THE COURT.

The Court charged that the measure of damages was what the use of the property was worth *to the plaintiff* during the time that he was deprived of it, and that in ascertaining the value the jury should consider how the *plaintiff could and would* have used the property, had it not been taken from him.

This was substituting a speculative and peculiar measure of damages for the true rule which, as applied to the case, was what the use of such property could have been procured for—in other words, the market value—and was erroneous.

The sixth instruction, given at the request of plaintiff, was erroneous in requiring the defendant to prove a special agreement for pasturage on land not included in the lease.

Judgment and order reversed and cause remanded for a new trial.

[No. 4,150.]

[Filed May 1, 1878.]

HEINLEN vs. MARTIN.

POWER OF ATTORNEY.—TENANTS IN COMMON.—OUSTER.—A power of attorney, to convey an undivided interest in lands, executed by a married woman,—in which her husband did not join,—could not confer authority to convey her interest. That interest,—an undivided one-sixth,—being subsequently conveyed to a party adverse to the whole interest, constituted him a tenant in common with the holder of the remaining five-sixths interest, with a proportionate share in rents and profits;—but, being found to have "*excluded the plaintiff from the same, and every part*

thereof," constitutes an *ouster*, and renders him liable to his co-tenant for the rents and profits appertaining to that share.
(Dissent, by Rhodes, J.,—as to the defendants responsibility for the rental value of the land).

Appeal from Third District Court, Santa Clara County,—
D. BELDEN, Judge.

STATEMENT OF FACTS.

On August 4, 1864, the six Arguellos, being undivided owners of one eleventh of the Rancho Santa Teresa in Santa Clara County, had their interests set apart to them by a final decree of the Third District Court,—subject to the rights of the parties to this action.—Then the said Arguellos gave a power of attorney to one Jesus Camarena, (with power of substitution) to sell their interests in the Rancho;—and he, on January 8, 1866, substituted one Augustus D. Splivalo as attorney in fact of the Arguellos, of which they had notice; and acquiesced. On May 10, 1866, he made a written agreement to sell to John Heinlen, plaintiff, the Arguellos' interest in the Rancho for \$4,500, gold coin, of which \$2,250 was paid down, and the balance—a like sum to be paid when certain incumbrances were clearer, and a clear title furnished to Heinlen. He then took possession of a portion of the premises, and retained same till November 27, 1868, when the defendants, Calvin Martin and Wayne B. Rogers, claiming the Arguellos' interest took possession, and have ever since excluded plaintiff therefrom. But Heinlen had possession and resided upon other certain eighteen acres of the said Rancho, not a part of the Arguellos' interest. On January 2, 1867, Heinlen tendered to Splivalo the remainder of the sum of purchase money, but which was refused. But Splivalo instead, sold and conveyed to one Antonio Aguayo the said one-eleventh of the Rancho for \$5,000, gold coin. But upon learning of Heinlen's claim and contract, Aguayo, on March 15, 1867, sold and conveyed his interest to Heinlen for \$2,750, gold coin, which he paid to Splivalo, and Splivalo returned to him, (Aguayo), his \$5,000 before paid.

On January 6th, 1867,—after the execution of the deed to Aguayo by Splivalo,—Calvin Martin bought of one of the Arguellos, all his interest in the ranch, for \$1,333, depositing \$250, with one T. S. Meyer for ratification. Defendants at same time, arranged with this Arguello to get deeds from all, for their respective shares of interest for \$8,000, when their deed should be secured from Mexico. In July, 1867, deeds were so executed to Martin for two-sixths, and to Rogers for three-sixths of the said eleventh, and the remainder of the consideration money paid of the \$8,000. All this time Martin & Rogers knew of the whole affair with Heinlin & Aguayo—and Heinlin's rights.—On November 27th, 1868, defendants took possession of the lands, and excluded Heinlin therefrom,—686 acres is valley or level lands, and 188, hill land,—and the whole rental value has been \$2,589 per year, from November 27th, 1868, till now. On trial, found—that Heinlin is entitled to the legal conveyance of the title; and Martin & Rogers only hold in trust for him, and are ordered to make deed of conveyance of same to him.

Further adjudged, that plaintiff recover from defendants, \$3,679 for use and

occupation to May 16th, 1870, the date of this action; and \$8,321 for the use and occupation from then to present time—and costs of suit.

To this a bill of exceptions, to new findings was filed, which was overruled, and judgment was entered on January 28th, 1873. Motion for new trial was denied, and appeal taken December 11th, 1873, from the judgment and order denying a new trial. Upon said appeal, a decision was rendered affirming the judgment; after which a rehearing was granted, upon which this decision is now rendered.

Francis E. Spencer, and Wm. Matthews and J. A. Moultrie, attorneys for plaintiffs and respondents.

Hosykton & Reynolds, attorneys for defendants and appellants.

OPINION BY THE COURT.

The argument on the rehearing has failed to convince us that there was any error in the opinion heretofore delivered in the cause, in respect to the proposition therein discussed. But at the last argument it was contended, that the ninth finding of fact, to the effect that on or about the 15th day of March, 1867, the plaintiff paid to Splivalo, as attorney in fact for the Arguellos, the sum of two thousand seven hundred and fifty dollars to complete his contract of purchase, is not supported by the evidence. But the point is not well taken. On his examination in chief, the witness Splivalo was asked this question: "Did you receive from Heinlen the balance, that is to say \$2,750, to make up the whole amount of \$5,000?" To which he answered: "I did." In answer to another question, whether he had offered to pay a portion of this money to Domingo Arguello, he replied: "When John Heinlen laid \$2,750 on my desk, I started to separate \$833.33, telling him (Domingo Arguello) to sit down and make me a receipt therefor, which he refused to do, and left the office." He was then asked, "What became of the \$2,750? Has that been retained in your possession till this time?" To which he replied, "I received the money, and at the request of C. T. Ryland I deposited it in the French Bank." He further testified that the deposit was made in the name of Ryland, who was then Heinlen's attorney, and that the money yet remains in the bank to Ryland's credit; that at the time of the deposit a pass-book, in which the deposit was entered, was received from the bank, which was in the nature of a certificate of deposit, and that the pass-book was deposited by Ryland and Splivalo in another bank, subject to their joint order, and it yet remains there. The evidence contains no other explanation than this of the transaction. It is not shown why the money, after it was paid to Splivalo, was deposited in Ryland's

name, nor, except by inference, if at all, that Heinlen was in any way privy to the arrangement as to the deposit. On this evidence the Court below found that the money was paid to Splivalo by Heinlen, and we are not prepared to say that the evidence did not justify the finding.

We held on the former hearing, and are still of the opinion, that the power of attorney to Camarena was void as to Josefa Ballardi Arguello de Camarena, on the ground that she was a married woman when she executed it, and that her husband did not unite in executing it. The plaintiff therefore acquired no equitable title to her undivided interest in the premises in controversy; and by a subsequent conveyance that interest vested in the defendants, who thereby became tenants in common with the plaintiff; and as such entitled, under the conveyance from said Josefa, to one undivided sixth part of the said premises, while the plaintiff was entitled to an undivided interest of five-sixths thereof. The relation of tenants in common having thus been established between the parties, the defendants contend that there was no proof of an ouster by the defendants prior to the commencement of the action, and consequently that they can in no event, be held accountable for rents and profits, or use and occupation, prior to that time. But in the twelfth finding the Court finds that on the 27th day of November, 1868, the defendants took possession of the land, "and have ever since retained possession of the same, *and excluded the plaintiff from the same and every part thereof.*" This is an express finding of an ouster; and it was not attacked on the motion for a new trial, on the ground that it was not justified by the evidence. It is, therefore, conclusive on the defendants.

The judgment is affirmed, except in so far as it awards to the plaintiff the undivided interest formerly held by Josefa Ballardi Arguello de Camarena in and to the premises described in the complaint, and the value of the use and occupation of the said interest, and in these particulars the judgment is reversed, and the cause remanded, with directions to the Court below to modify its judgment in accordance with this opinion.

(Wallace C. J., being disqualified, did not sit in this cause.)

I dissent from the foregoing opinion and judgment on the grounds, among others, that the contract which is ordered to be specially enforced is not set up in the complaint; that if that contract ought to be enforced, the portion of the purchase money which was deposited in the name of an agent or attor-

ney of the plaintiff ought to be ordered to be paid to the defendants, and that the defendants ought not to be held responsible for the rental value of the land.

RHODES J.

A motion for another hearing in this case was filed May 24th; and a stay of proceedings granted till determined.

Supreme Court Unwritten Opinions.

[No. 6017.—Decided April 29, 1878.]

Matter of the Estate of Christina Feyhl, deceased.

Appeal from Probate Court, Sacramento County,—

ROBERT C. CLARK, Judge.

DIVORCED WOMAN'S ESTATE.—Sec. 1469 C. C. P. construed.—Probate Judge must set aside all of such an estate to her minor children, after the expenses of settling the estate are paid.

STATEMENT OF THE CASE.

Christina Feyhl, now deceased, was divorced from G. A. Feyhl in October, 1876, and the custody and maintenance of the two minor children was given to him, and he paid Christina \$600 in gold coin, for her separate use and support. In November she died leaving the \$600. G. A. Feyhl, on his own petition was appointed administrator of her estate, and in January, 1877, published notice to creditors, whereupon Curtis & Clunie presented a claim for \$100, for professional services rendered to her in obtaining the said divorce, and at her request.

G. A. Feyhl as administrator, rejected the claim,—upon which Curtis & Clunie, sued, and obtained judgment, and filed transcript of same in Probate Court: On July 16th, 1877, the administrator petitioned the Court to set aside the balance of the estate,—the expenses of settlement all being paid—to the two children. C. & C. objected, and urged their claim, and that the property was for her separate use, and she had not the care and support of the children while in life.

Decree of the Court to set aside for the children:—from which C. & C. appealed on October 24, 1877, urging that this

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case is not covered by sec. 1469, C. C. P., as the children were otherwise provided for. Respondent claiming that the Judge has no discretion under the statute, but *must* assign all the estate to the minor children.—Judgment affirmed.—Wallace C. J. , did not express an opinion.

Curtis & Clunie, in *pro. pers.*, attorneys for appellant.

Ben. Bullard Jr., for administrator and respondent.

[No. 5611.—Decided April 20, 1878.]

N: P. ROGERS and L. VESTAL, Plaintiff and Respondent.
vs.

G. WATSON, Defendant and Appellant.

Appeal from Twenty-Second District Court, Sonoma County.

W. T. SEXTON, Acting Judge.

MORTGAGE FORECLOSURE—DEMURRER.—A defendant cannot set up a defense of fraud or misrepresentation on a money contract, while still retaining possession of the property in question, and without making an effort to rescind.

STATEMENT OF THE CASE.

On October 25, 1875, the plaintiffs sold the defendant a claim of 3000 acres of land known as the "Old John L. Crow Ranch," in Ocean Township in Sonoma County, for \$3,600, for which defendant paid \$1,000, cash down, and gave a note for \$2,600, balance payable in two instalments,—one of \$600 on April 25, 1876, and \$2,000, on October 26, 1876, with interest at one per cent. a month, at maturity. The note not being paid, the plaintiff brought action for foreclosure of the mortgage and sale of the premises.

Defendant, in answer, made a counter claim that he had paid \$1,000 down on the ranch and that plaintiff, had represented it as unsurveyed government land, in large amount, and partly covered with valuable timber. But that it was mostly only fit for grazing purposes, and *was surveyed*, and occupied by other parties, and liable to settlement, etc., until defendant had only 160 acres left, thus making a total failure of the consideration of his purchase and he had sustained damages of \$5,000, and asked judgment for that amount. To

this plaintiff demurred—which demurrer was sustained. Cause tried on February 19, 1877, and judgment given for plaintiff for \$3,010.80 and attorney's fees \$150, and that the premises be sold.

From this judgment the defendant appealed on March 22, 1877, on the ground of error in sustaining the plaintiff's demurrer.

The respondent claims that defendant had equal means of knowledge, so the law would not protect him in negligence, nor had he taken any steps to rescind.

Judgment and decree affirmed.

D. D. Carder, attorney for plaintiff and respondent.

A. Thomas & E. L. Whipple, for defendant and appellant.

[No. 5933.—Decided April 29th, 1878.]

D. M. BURNS, Plaintiff and Respondent.

vs.

E. H. MILLER, Defendant and Appellant.

Appeal from Sixth District Court, Yolo County,—

S. C. DENSON, Judge.

SCHOOL LAND CERTIFICATE.—A School Land Certificate based upon an application which had been altered after filing, to a different number, and so as to apply to different land, declared invalid, and annulled; and right of entry awarded to a subsequent applicant.

STATEMENT OF THE CASE.

This action is a contest for right of entry and purchase of 160 acres of State School land in Yolo County.

It appears that the defendant, E. H. Miller, on September 8, 1868, filed an application in the State Surveyor General's office, for a certain tract of land in *Yuba County*, of 160 acres, numbered 635. This remained a long time in the office without approval, until after March 24, 1870, it appeared to have been altered to No. 6,631, for 160 and 48-100 acres in *Yolo County*,—the premises now in contest. On October 4, 1875, the Surveyor General approved this, (as altered), and issued a certificate of purchase to Miller on November 19, 1875. Now,

on September 8, 1876, plaintiff, D. M. Burns, made application for same lands in Yolo County, and on October 9, 1876, filed in the Surveyor General's office a protest against issuance of patent to defendant, and a demand for reference of the contest to the District Court for decision, which was done on December 4, 1876.

Upon trial the defendant demurred, which was overruled; and the Court found that defendant's certificate, was invalid, and should be annulled and canceled,—and he had no interest in the land;—and that plaintiff was entitled to enter the same,—and recover costs. Judgment filed June 7, 1877.

Defendant moved for new trial, on a statement of the case,—which was denied, October 3, 1877, and an appeal taken December 1, 1877,—from the judgment, and order denying new trial.

Judgment and order now affirmed.

W. B. Treadwell, of Treadwell & Garrouette, attorney for plaintiffs and respondents.

T. B. McFarland, attorney for defendant and appellant.

[No. 6006.—Decided April 24, 1878.]

WM. DEMPSEY, Plaintiff and respondent.

vs.

J. M. BAXTER and MARY BAXTER, Dft's and Appl's.
Appeal from Fifth District Court, San Joaquin County,—
S. A. BOOKER, Judge.

EJECTMENT.—ACKNOWLEDGMENT OF DEED.—The defendants had deeded the property in dispute,—from which plaintiff held the title,—but the wife claimed that the acknowledgment of her signature was in presence of her husband, and hence invalid.

The notary proved her full voluntary acknowledgment, and his explanation of the contents of the deed. Verdict for plaintiff.

STATEMENT OF THE CASE.

This is an action of ejectment.—The plaintiff Dempsey claimed the ownership of two certain lots in the City of Stockton by deed from one J. F. Chase, dated November 4, 1876, and showed a deed to said Chase from both the defendants, J. M. and Mary Baxter, dated October 5, 1875, for

same lots for a consideration of \$1,990. And that on May 1, 1877, the defendants entered the said premises and ousted him therefrom; and prays judgment and restitution, and damages \$750. Defendant demurred which was overruled. Thereupon Mary Baxter petitions to intervene, showing that the premises have been for thirteen years their home, and also recorded as a homestead, which she had never abandoned. Her petition was demurred to by plaintiff,—which was overruled, and the petition allowed.

Cause tried by jury, and a verdict for plaintiff, on September 3d, 1877,—and judgment for the possession of the premises, and \$60 rent from May 1st, to September 1st, 1877,—and costs of suit, \$57.30,

Motion for a new trial, upon a statement of the case. Order on November 1st, 1877, denying new trial; upon which defendants appealed on December 27th, 1877.

The statement on motion for a new trial, discloses the only point relied on by defendant, viz:

The alleged omission of the notary public taking the acknowledgment of Mary Baxter to the conveyance of October 5th, 1875, to make her acquainted with the contents of the deed upon an examination of her, made separate and apart from, and without the hearing of her husband.

The testimony of the notary public being in direct rebuttal, the jury found on the special issues submitted to them, that the notary taking the acknowledgment, explained to Mary Baxter the contents of the deed; that whilst so signing, the said defendant knew she was conveying her homestead, and that she acknowledged to the notary the voluntary execution of the conveyance, and her unwillingness to retract such execution.

The judgment and order is here affirmed, no written opinion having been filed.

W. L. Dudley and F. T. Baldwin, attorneys for plaintiff and respondent.

Terry, McKinne & Terry, attorneys for defendants and appellants.

Recent U. S. Land Decisions.

Pond vs. Southern Minnesota Rail Road Company.

WHERE a warrant, located in payment of land, is canceled for forgery in the assignment and a substitution of cash or another warrant is authorized and not limited in time, the land covered by such location is excepted from a railroad grant attaching after such cancellation, though the substitution is not made for years.

LAND subject to private entry may be purchased by a party not residing thereon. LAND covered by a voidable uncanceled entry is not legally vacant.

DEPARTMENT OF THE INTERIOR, }
WASHINGTON, D. C. }

To the Commissioner of the General Land Office—SIR: I have considered the case of Theron C. Pond vs. Southern Minnesota Railroad Company, involving the south half of north-west quarter and north-east quarter of south-west quarter section 33, township 103, range 24, Worthington, Minn., on appeal from your decision of July 14, 1876, refusing to list the above land to said railroad company.

The lands in question are within the limits of the grant to the Southern Minnesota Railroad Company, which took effect November 29, 1866.

Pond entered this land with military bounty land warrant, No. 70723; June 6, 1863. It appears that this land warrant was issued to Phoebe Gill, widow of Stephen Gill, on April 9, 1856, and was stolen from her, and her signature forged to the assignment. Said warrant was canceled for that reason by Pension Bureau, March 12, 1866.

On March 29, 1866, your office allowed Mr. Pond the privilege of substituting a legal consideration in lieu of said warrant, but it does not appear that this has ever been done.

You refused to certify the land to the railroad company because, at the date the right of the company attached, the land was covered by a claim capable of being perfected. The records of your office show that, although the *warrant* has been canceled, the *entry* still remains uncanceled.

I am of opinion that Pond had a valid right to perfect his claim at the time the grant to the railroad company took effect, and that the land was thereby excepted from the grant.

Your decision is affirmed, and the papers transmitted with your letter of November 13, 1876, are herewith returned.

Very respectfully,
C. SCHURZ, Secretary.

I have considered the application of John K. Brown, land commissioner of the Southern Minnesota Railroad Company, for a reconsideration of my decision in the case of Theron C. Pond vs. Southern Minnesota Railroad Company rendered March 14, 1877.

The tract involved in this case is the south half of northwest quarter, and northeast quarter of southwest quarter section 33, township 103, range 24, and is situated within the Worthington, Minn., land district, and within the limits of the grant to the above mentioned railroad company, which took effect November 29, 1866.

This application is based on the following grounds, to wit:

First. That Pond had not resided upon or improved said land prior to entry.

Second. That said warrant location was canceled before the right of the road attached, of which fact Pond had notice, and as he has not perfected his entry or lived on the land since, this default is conclusive evidence of abandonment.

Third. That the land was *ipse jure* vacant at the time the right of the road attached.

With reference to the first ground relied upon by the road, I find from an examination of the records of your office, that Pond entered the land in contest with military bounty land warrant No. 70723, June 6, 1863; that said warrant had been stolen from Phoebe Gill, widow of Stephen Gill, to whom it was issued, and her signature forged to the assignment, and it was therefore canceled by the Pension Bureau March 12, 1866, and a new one issued in lieu thereof.

The land in contest was offered October 29, 1860, and being thus made subject to sale at a private entry, the law did not require that Pond should reside upon or cultivate it prior to making his warrant location.

As to the second ground, I think it only necessary to say that as your office on March 20, 1866, allowed Mr. Pond the privilege of substituting a legal consideration in lieu of the canceled warrant, and as this privilege *was not limited in time*, the *entry* although voidable, was capable of being legally perfected at the time the grant to the road took effect, and the land did not inure to the grant, nor was Pond required by law to live on the land after entry.

As to the third ground, I am of opinion that as the land was covered by a voidable uncanceled entry it was not legally vacant, and the application for a rehearing is refused.

This entry should be canceled unless perfected by Mr. Pond, without unreasonable delay after notice.

The papers transmitted with your letter of April 5, 1877, are herewith returned.

Very respectfully,

C. SCHURZ, Secretary.

—Copp's Land Owner for February.

JUDICIAL DECISIONS UNDER THE HOMESTEAD LAW.

Furnished by J. Vance Lewis, Esq., attorney-at-law, Washington, D. C., and taken from the manuscript of his forthcoming work on "Judicial Public Land Decisions."

"If a settler on public land give a mortgage on the land, and then enter the land as a homestead, the mortgage may be enforced.

By the Court:

"Had the deed been an absolute conveyance in fee instead of a mortgage in fee, any subsequently acquired title, under our statute concerning conveyances would have enured to the benefit of the plaintiff. (Sec. 33.)

"The fact that the title subsequently comes from the United States would make no difference.

"There is nothing in the Homestead Act of 1862 forbidding voluntary alienation by the grantee under that act. The same principle applies to a mortgage of the fee. (Clark vs Baker, 14 Cal. 630.)

CALIFORNIA LEGAL RECORD.

Vol. I.

JUNE 1, 1878.

No. 10.

Legal Notes.

BILL TO CONFER CERTAIN POWERS ON UNITED STATES CIRCUIT AND DISTRICT COURT.—The bill just introduced in Congress by Senator Sargent, to confer certain powers on United States Circuit and Districts Courts, provides that members of the Bar of Federal District Courts in any State may be admitted to practice in Circuit and District Courts of any other State, upon production of their certificates of admission, and on making affidavit that they are members of such Bar. The purpose of the bill is to obviate the inconvenience, delay and expense which frequently arise from the general requirement that admission to the Bar of a Federal District Court shall have been preceded by admission to practice in the Supreme Court of the State in which the District Court is located.

A LEGAL PROBLEM.—The Society for the Prevention of Cruelty to Animals, in New York City is endeavoring to find out if a street car can be overloaded. They arrested John O'Connell, the driver—he had thirty-nine on board—more, thought the Society, than any team of two horses ought to draw. O'Connell in his conversation with the Judge in Court thought the load was not too large; and the President when asked on the the trial what constituted a car-load, replied: "Anything we can get." But the Jury thought otherwise, and gave their verdict for the Society. The defeated company—not satisfied—has appealed to the Supreme Court. On this decision will probably depend the comfort and convenience of millions of miserable people.

THE MCGARRAHAN CASE DECIDED.—We have just received by a "Record-Union" special, of May 27th, the U. S. Supreme Court decision ending the long controversy in the New Idria mine claim, which we give in full in this issue.

THE LOS ANGELES CALENDAR.—There will be placed on the Calendar for the October term at Los Angeles, all the causes for the Counties of Los Angeles, San Diego, Ventura, San Bernardino, Santa Barbara, Kern, and Inyo:—unless a stipulation be filed before June 15th, to place them on the July Calendar for San Francisco.

THE NEW RULES OF OUR SUPREME COURT have just been published by the State Printer, in their usually neat pamphlet form, with marginal references, and can be obtained by the deserving at the Supreme Court Clerk's office at both San Francisco and Sacramento;—and are about concluded on the outside page of the **LEGAL RECORD**. They go into affect July 8th. Let all remember.

DECISIONS ALREADY PUBLISHED.—In the 10 numbers of the **RECORD** now issued, we have Published 103. decisions of our Supreme Court,—just 25 more, by actual count, than have appeared during the same time in any other journal, There are still 48 more of the "Unwritten Opinions" to be reported, which we shall endeavor to get in before the July term begins.

HASTINGS LAW COLLEGE.—We publish in this number the "Act of Incorporation" of this munificent bequest of Judge Hastings to our State University.

COMMISSIONER OF DEEDS.—Daniel Sharp has been appointed by Governor Irwin as a Commissioner of Deeds for California, to reside at Boston, Massachusetts.

Supreme Court of California.

[April Term, 1878.]

[No. 10,299.]

[Filed April 22, 1878.]

PEOPLE vs. ROYAL.

Appeal from the County Court of Sonoma County,—
J. G. PRESSLEY, Judge.

RAPE.—DISTINGUISHED FROM SEDUCTION.—*Force constitutes Rape.* Any manipulation, art or device, or other means by which the mind and will of a female may be so bewildered or overpowered as to render her at the time unconscious of the nature of the act of carnal intercourse, or powerless to resist it, are properly classed under the head of *Solicitation*, and constitute the difference between *Seduction* and *Rape*. To allow that these would render *less proof* of resistance to force necessary; and that consent thus obtained would be no consent;—would entirely overthrow the established law with respect to Rape.

INADMISSIBLE EVIDENCE.—The testimony of a medical expert that improper familiarities with a female might have the effect to "bewilder," or "paralyze" her mind and will, and render less force and resistance necessary, is inadmissible, as evidence of Rape.

STATEMENT OF FACTS.

Dr. W. W. Royal of Santa Rosa, Sonoma County, was indicted by the Grand Jury of that County on July 5, 1877, for a rape committed March 29, 1877, on Miss Flora Lester, aged seventeen, who was living with a relative in Santa Rosa, and attending the Methodist College.

Under a first indictment, the Doctor was about to escape, but the case was re-submitted to the Grand Jury, upon a suggestion from the Judge, and this bill was brought under sec. 261, of the Penal Code,—under three clauses: First, Charging the act to be by force and violence which overcame all resistance. Second, By threats of immediate and great bodily harm, accompanied by apparent power of execution. Third, That at the time of the commission of the act she was unconscious of the nature of the act, and the defendant at the time knew it. The witnesses before the Grand Jury, besides the prosecutrix, were S. S. Nowlin, D. C. Nichol, Dr. R. P. Smith, Mrs. Jennie Hanson, B. F. Keim, T. F. Baxter, D. C. Porter, and M. V. Wolford.

A strong feeling of indignation and excitement had been growing in the community, which had found expression in the County papers in suggestions of lynching the Doctor; and in his expulsion from the Masonic Lodge; and which had culminated in an effigy placarded with his name being carried in the public procession of the celebration of the 4th of July.

On the 5th, (the day of the indictment) he was shot, at the Court House en-

trance by the father of the girl, in the presence of a crowd of people, though without any serious injury. He was arraigned on July 9th, and entered a demurrer on the ground that the different charges in the indictment were contradictory.—This was overruled, and he was allowed till the 11th to plead.

He then moved for a change of venue, claiming that he could not have a fair trial in Santa Rosa, and filed affidavits that two important witnesses in his behalf were so intimidated by the public feeling that they dare not appear to testify. Upon which the District attorney asked time for filing counter affidavits, which was granted till the 16th;—and he procured counter affidavits from many parties near Healdsburg,—where these two witnesses had been employed, which showed a strong appearance of those witnesses being persuaded by the defendant to keep out of the way. The change of venue was denied on the 20th, and the case set for trial on the 23d,—when a plea was entered of "not guilty of the offense charged in this indictment." The defendant then asked for a continuance, claiming that a very important witness by whom he expected to prove the former questionable reputation of the girl in Stanislaus County,—(additionally to the two before mentioned who feared to come)—was now in Texas, and he was using every means to secure his presence at the trial.

The motion for a continuance was denied on the 20th, and the trial commenced on July 26th. Mr. Southard for the defense asked that the Penal Statute concerning Rape be read to the Jury before the evidence was introduced, to enable them to judge properly of it,—which was denied. In his affidavits asking a change of venue the defendant claimed so much danger of being lynched should he be likely to escape conviction that the Judge assigned him the personal attendance and protection of the Sheriff to and from his house during the early part of the trial—but which was subsequently withdrawn.

The panel for the Jury was drawn from the county *outside* of Santa Rosa Township—to which defendant objected claiming his right of its being drawn from the whole County.

During the trial, one of the witnesses testified that the defendant had boasted to him that he intended to accomplish his purpose with the girl and also her sister, and had confessed later that he had done so with her.

The trial developed that the defendant while professionally visiting the family where the girl lived, became acquainted with her and invited her to call and see his wife, which Mrs. Royal seconded by calling and taking her home with her in their buggy,—after which the girl called a few times upon them, with her sister, and had ridden some with Mrs. Royal and the Doctor in their buggy, but not alone with him till, about sun down on March 29th he called and asked her to ride with him and visit his wife,—to which she consented. But he soon changed his course out to the "Healdsburg Road" where he soon commenced taking improper liberties with her, which she claimed to have resisted the best she could, and urged their return, so that he finally turned back, and desisting from further importunities, drove through town to his office, induced her to alight, and accompany him into his office, where he locked the door, and proceeded to the accomplishment of his purpose,—which she declared herself too bewildered, or dull and stupid to successfully resist.

She testified that he neither threatened nor treated her roughly during the occurrence.

They then re-entered the buggy and drove to his house,—she saw and spoke with Mrs. Royal, after which they both took her home. The next day the Doctor called and invited her to ride, but she declined, and soon after disclosed to her friend what had occurred.

The trial was closed August 2, with a verdict of "guilty as charged," and August 20th, set for the sentence. This was continued to the 27th, and then to the 31st, the defendant moving for a new trial,—with three lengthy Bills of Exceptions,—which was denied. A motion for arrest of judgment was also overruled, and defendant finally sentenced to fifteen years in the State Prison.

From this judgment the defendant appealed, as also from the order denying motion for new trial, and on rulings and questions of both law and fact.

Barclay Henley, District Attorney, and *W. E. Turner*, attorneys for People, respondents.

J. B. Southard, *E. D. Ham* and *J. T. Campbell*, attorneys for defendant and appellant.

OPINION BY THE COURT.

Against the objection of the defendant, the witness Smith was permitted to testify, that in his opinion as a medical man, the "manipulation" of the person of the prosecutrix on the same day while driving on the public road between Healdsburg and Santa Rosa, and before she accompanied defendant to his office, may have weakened her capacity to resist when the alleged rape was committed. The effect of such "manipulation" upon females, as explained by the witness, is ordinarily "to excite their passions to such an extent as to influence their judgment and mental condition." The expert adds: "If it excited no passion or gave no pleasure, it might affect the intellect or might not—might make some angry and might frighten others. Supposing it excites no passion at all and no pleasurable emotion, it *might have the effect to bewilder her.*"

The foregoing, and more of the same kind of testimony appearing in the record, was inadmissible. The common law judges recognized no such refinement, but referred all improper caresses and indecent liberties to the head of *solicitation*. The homely sense of our ancestors distinguished without difficulty between the *force* which constitutes rape and the blandishments of the seducer.

If such testimony was admissible at all, the jury were authorized to regard it as *evidence* which made *less resistance* sufficient than would in their opinion have been sufficient, except for the testimony in respect to the effect of the alleged manipulation. That the evidence may have influenced the verdict

cannot be disputed, and the rule requires of us to reverse a judgment when improper evidence has been admitted, unless it clearly appears that the evidence erroneously admitted could not have had any effect on the action of the jury.

That the testimony of the medical witness did influence the verdict, is made to appear the more distinctly by the *charge* of the Court. Portions of the charge suggest to the jury the theory—or at least possibility—that the *will* of the prosecutrix and her capacity of resistance might have been destroyed by some occult influence proceeding from defendant; that her mind might have been “bewildered” or indeed “paralyzed” by some mysterious agency, entirely disconnected from any physical violence or threat of violence. There is no pretense that any drug or noxious substance was employed to render the prosecutrix unconscious, or to produce unsoundness of mind. The portions of the charge of the Court referred to, if they had application to any part of the evidence, could only have been understood by the jury as having application to such testimony as that given by the witness Smith; and as an instruction that the law demands less resistance on the part of the female, when erotic passion has been aroused by the solicitation of a suitor, accompanied by improper familiarities, at a period when the amatory passion is supposed to be peculiarly active, than when no such ardent appeal or manipulation has preceded the alleged illicit intercourse.

For example, amongst other matters the Court charged: “If from all the evidence, you are satisfied that on *or about* the time alleged, the defendant *by manipulation, art or device, or by other means* so bewildered or overpowered the *mind and will* of this girl as to render her at the time *unconscious of the nature of the act of carnal intercourse*, or powerless to resist it, and under those circumstances he had carnal intercourse with her, he is guilty of rape.”

Such language conveys the notion distinctly that *seduction* may be *rape*; that the employment of any art or device by which the moral nature of a female is corrupted, so that she is no longer able to resist the temptation to yield to sexual desire, will render sufficient less proof of resistance than would otherwise be necessary; that consent thus obtained is no consent. The proposition entirely overthrows the established law in respect to the offense with which the defendant is charged.

Judgment and order reversed and cause remanded for a new trial.

[No. 6008]

[Filed April 30, 1878.]

ATKINSON vs. THE AMADOR & SAC'TO CANAL CO'

Appeal from the Sixth District Court, Sacramento County,—
W. T. SEXTON, Acting Judge.

INSTRUCTIONS.—AMENDED COMPLAINT.—In a suit for damages to land, the complaint was afterward amended to include land not in the original complaint, and defendant asked an instruction to exclude such land from the estimate for any damage done prior to such amendment, which was refused.

Held, that the amendment was the introduction of a new cause of action, and the instruction asked was correct, and should have been given.

STATEMENT OF FACTS.

George Atkinson, plaintiff, being in possession, and claiming ownership of about 640 acres of land lying on both sides of the Arkansas creek, which he used for agricultural purposes, complains on March 30, 1875, that between March 30, 1872 and March 30, 1874, the Amador & Sacramento Canal Co., a corporation for mining purposes, so conducted their gold mining operations on adjoining and higher ground as to overflow said creek, and deposit on plaintiff's land a great depth of debris, stones, and coarse gravel, preventing cultivation and burying his fences, destroying his ditches, and carrying away dams, damaging him to the extent of \$15,000, for which he prays judgment.

Defendant demurred, which was overruled. Plaintiff filed an amended complaint on January 3, 1877, including a parcel of land known as the "Clark Ranch," in the damage and that had before been omitted. To this defendant demurred in part, which was also overruled. Then defendant in answer claimed that the mining customs for over twenty-six years allowed all water courses to be the channels of such debris from mining claims, and that they held a previous right from the U. S. as miners, and the plaintiff was debarred by subdivision 2 of Sec. 338, C. C. P.

Case tried by jury, and on January 25, 1877, verdict for plaintiff for \$4000, and judgment for costs against defendant, of \$1,674.55. The certain part of land damaged, and known as the "Clark Ranch," was not included in the first complaint, and so could not be included in the damages as awarded before January 3, 1874. Appeal taken from the judgment on bill of exceptions on March 23, 1877.

H. O. Beatty (& *Denson*), *Edgerton, Tubbs & Cole*, and *A. P. Caltin*, attorneys for plaintiff and respondent.

W. C. Belcher, *Haymond & Coggins*, and *Ben. Bullard Jr.*, attorneys for defendant and plaintiff.

OPINION BY THE COURT.

Among other instructions asked by the defendant and refused by the Court was the following: "The Jury, in

estimating all damages done to the land known as the Clark Ranch, must exclude from consideration any damage or injury done prior to the first day of January, 1874. Whatever injury was done before that time cannot be recovered in this action."

The original complaint was filed on the 30th day of March, 1875, but in that complaint no cause of action founded upon injuries alleged to have been done to the "Clark Ranch" was set forth. In the amended complaint filed January 3, 1877, the injury alleged to have been done by the defendant to that ranch was for the first time counted upon and damages therefor claimed. The amended complaint, in so far as it counted upon the injury done to that ranch, was the introduction of a new cause of action and against which the defendant had the right to plead, and did plead, the statute of limitations. In view of this plea upon record, the plaintiff in adducing the evidence in support of his case as to the "Clark Ranch," should have confined himself to proof of injuries, if any, done since the 3d day of January, 1874, and had he done so the giving of the instruction refused, would not have embarrassed the jury in finding a verdict for such damages as had been shown.

However this may be, the instruction as asked was correct in point of law, and should have been given to the jury.

Judgment and order reversed and cause remanded for a new trial. Appellants to recover but one-half of the costs upon this appeal.

Supreme Court Unwritten Opinions.

[No. 5900.—Decided April 20, 1878.]

DAVID WOOSTER, Plaintiff and Appellant.

vs.

TIMOTHY PAIGE. Defendant and Respondent.

Appeal from Third District Court, San Francisco,—

PROFESSIONAL MEDICAL SERVICES—MAL-PRACTICE.—When a physician follows a course of treatment sustained by medical authority, he is entitled to pay for his services.

STATEMENT OF THE CASE.

This is an action in assumpsit, brought by the respondent David Wooster, plaintiff, a physician and surgeon, to recover

from the appellant, Timothy Paige, defendant, the sum of \$1000, for medical and surgical services rendered to appellant's minor child. The treatment was for hip disease and was given from February 1, 1875, to August 1, 1875, at which time the child was pronounced cured and discharged from further treatment. The charge for treatment was \$1,000, which defendant refused to pay, and brought a counter claim for \$1,000, for mal-practice, claiming that the child after three or four months became worse with the disease than before.

Trial by jury, September 13, 1877, and verdict for plaintiff for \$1,000. The evidence on trial showed that the plaintiff had been in practice for thirty years, and had several diplomas, etc. Motion by defendant for a new trial, based on bill of exceptions, which was denied November 13th 1877.

Appeal taken November 27th, from the judgment, and the order denying a new trial.—In the charge to the jury by the court, several exceptions were taken by the defendant, and the Bill of exceptions was on the appeal as well as on motion for a new trial.

Judgment and order now affirmed.

N. Hamilton, A. J. LeBreton and C. Campbell, attorneys for plaintiffs and respondents.

Robt. Y. Hayne, attorney for defendant and appellant.

Supreme Court of the United States.

[In Error to the Supreme Court of California.]

WILLIAM MCGARRAHAN

vs.

THE NEW IDRIA MINING COMPANY.

OPINION BY THE COURT.

The federal question in this case is whether a record in a volume kept at the General Land Office at Washington for the recording of patents of the United States issued upon California confirmed Mexican Grants, relied upon by McGarrahan as evidence of his title, proves a conveyance to him by the United States of the land in controversy. In his behalf it is contended that the record is itself a grant, or, if not, that it proves the issue to him of a patent, which does grant a legal title to the property described. That the record is not in itself a grant of title is evident. The Act to ascertain and settle private land claims in the State of California (9 Stat. 621) provides (section 13) that for all claims finally confirmed * * * a patent shall issue to the claim-

ant upon his presenting to the General Land Office an authentic copy of such confirmation and plot of survey, etc. By section 8 of the Act for the establishment of a General Land Office in the Department of the Treasury (2 Stat. 717), it is enacted that all patents issuing from said office shall be issued in the name of the United States, and under the seal of said office, and be signed by the President of the United States and be countersigned by the Commissioner of said office, and shall be recorded in said office in books to be kept for that purpose. Thus a patent executed in the prescribed form which issues from the General Land Office is made an instrument for passing title. The United States record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent, because, like the patent it shows that the patent containing the grant has been issued. The record called for by Act of Congress is made by copying the patent to be issued into a book kept for that purpose. The effect of the record, therefore, is to show that the instrument, such as is there copied, has actually been prepared for issue from the General Land Office. If the instrument recorded is sufficient on its face to pass title, it is to be presumed that the grant has actually been made; but if it is not sufficient, no such presumption arises. In short, for purposes of evidence, the record stands in the same position, and has the same effect, as the instrument of which it purports to be a copy. The same defense can be made against the record as could be made against the instrument recorded. The public records of the Executive Departments of the Government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for the preservation of evidence of the transactions of the Department. This brings us to inquire whether this record shows upon its face the execution of a patent sufficient in law to transfer a title of the premises in question from the United States to McGarrahan, and here it may not be improper to note that although the case shows that in July, 1870, before this suit was commenced, the Commissioner of the Land Office and the Recorder caused to be entered upon the face of the record, over their official signatures, a statement to the effect that no patent was ever in fact executed or delivered to McGarrahan. He rests the whole case upon the record, and the evidence it furnishes. This he has an undoubted right to do; but if he does, he must stand or fall by what it proves. It is his own fault if, having a valid patent in his possession, he fails to produce it. By the Act to re-organize the General Land Office (5 Stat. 107) it was provided (section 1) "that executive duties relating * * * to private claims of land, and the issuing of patents for all grants of land, under authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under direction of the President of the United States; and (Section 4) that there shall be appointed by the President, by and with the consent of the Senate, a Recorder of the General Land Office, whose duty it shall be, in pursuance of instructions from the Commissioner, to certify and affix the seal of the General Land Office to all patents for public lands, and he shall attend to the correct engrossing and rendering, and the transmission of such patents. He shall prepare alphabetical indexes of the names of all persons entitled to patents. * * *

By section 6 it was further provided that it shall be lawful for the President of

the United States, by and with the advice and consent of the Senate, to appoint a secretary * * * whose duty it shall be, under the direction of the President, to sign his name, and for him, to all patents for lands sold or granted under the authority of the United States. By the Act of March 3, 1841, (5 stat. 416, sec. 2) the duty of countersigning the patents was transferred from the Commissioner of the General Land Office to the Recorder. Thus it appears that a patent for lands must be signed in the name of the President, either by himself or his duly appointed Secretary, sealed with the seal of the General Land Office, and countersigned by the Recorder. Until all these things have been done, the United States have not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what in the absence of statutory regulations, would constitute a valid grant, but what the statute requires; not what other statutes may prescribe, but what this one does. Neither signing, nor sealing, nor countersigning can be omitted, any more than the signing, or sealing, or acknowledgement by the grantor, or the attestation of witnesses, when by the statutes such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands. It has never been doubted that in such cases the omission of any of the statutory requirements invalidate a deed. A legal title to lands cannot be conveyed except in the form provided by law; but if either of the requisites to the due execution of the enactment may be considered as directory, countersigning by the Recorder should not be permitted to occupy that position. The President may sign by his Secretary, but the Recorder must sign himself. He countersigns—that is to say, signs opposite to and after the President, by way of authentication. Being specially charged with the duty of attending to the issue of patents, it is peculiarly appropriate that his attestation should be the last act to be performed in the perfection of an instrument, and that he should do it personally. The record in this case shows an instrument in the form of a patent signed in the name of the President, and sealed. The place for the signature of the acting Recorder is left blank. The name of the President is signed by his Secretary. The claim which is made that Stoddard, the Secretary, also countersigned as acting Recorder, is not sustained by the evidence. His signature appears only as Secretary, and there is nothing whatever to indicate that he attempted to act as Recorder. Besides, the law provides (5 stat. 111, sec. 8) that whenever the office of Recorder shall become vacant, or in case of sickness or absence of the Recorder, the duties of his office shall be performed ad interim by the principal clerk on private land claims. It is certainly not to be presumed that the same person will hold at the same time the office of Secretary to the President for patents, and of principal clerk on private land claims; and if it were, his signature as Secretary will not be treated as his signature as Recorder ad interim, or acting Recorder. He must sign both as Secretary or as Recorder. The case is, therefore, one in which the record shows upon its face an instrument prepared for patent, but not countersigned by the Recorder. If the patent thus defectively executed had itself been introduced in evidence, it would not have shown a grant absolutely perfected.

But it is said that the record of the patent is evidence of fact; that the Recorder recognized its completeness, and is equivalent to his countersignature. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the Government to be valid. A patent must be actually executed before it operates as a grant. The last formalities of law prescribed for its execution must be complied with. No provision is made for the equivalent of these formalities. Even an actual delivery of a patent by the Recorder in person would not supply the place of his countersignature, any more than the delivery of a paper by a private person, without being signed, would make it his deed; but the record of a patent would not necessarily show as much the recognition of its validity as personal delivery by the Recorder, because he only attends to recording, and is not required to do it in person. The only way in which he can lawfully and effectually recognize the validity of a patent is by personally countersigning it. Again, it is said that the Act of March 3, 1843 (5 stat. 627), remedies the defect, because it provides that literal exemplifications of any such records which may have been or may be granted in virtue of the provisions of the seventh section of the Act entitled "an Act to reorganize the General Land Office," shall be deemed and held to be of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted therein. This Act does not, however, dispense with signing and countersigning. The record to prove a valid patent must still show that these provisions of law were complied with. The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when issued. If they are partially inserted in the record, it will be presumed that they fully appeared in the patent; but no such presumption will be raised if no signature is shown by the record. Here no signature does appear, and consequently none will be presumed. The failure to record a patent does not defeat the grant. It only takes from the party one of the means of making his proof. If he can produce the patent itself, and it is executed with all the formalities required by law, he can still maintain his rights under it. He is not therefore necessarily deprived of his title, because of defective records. He is in no worse condition with the signature omitted than he would have been, if the description of his land had been erroneously copied or other mistakes had been made, which rendered the record useless for the purpose of evidence.

A perfect record of a perfect patent proves a grant, but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such case, if a perfect patent has in fact issued, it must be proven in some other way than by the record. It is undoubtedly true that when the right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the Government charged with that duty, the record will be treated as presumptive evidence of its delivery to and acceptance by the grantee. But until the patent is complete, it cannot properly be recorded and consequently an incomplete record raises no such presumption. Again, it is said the record of the instrument which the law requires to be recorded is *prima facie* evidence of the

validity of the instrument. That is undoubtedly true, if the instrument recorded is apparently valid. The presumption arising from the record is that whatever appears to have been done actually was done. If the record shows a perfect instrument, the presumption is in favor of its validity; but if it shows an imperfect instrument, the corresponding presumption follows. Here the instrument recorded appears to have been incomplete, and consequently it must be presumed to be invalid. This presumption will continue until overcome by proof that the instrument, as executed and delivered, was valid. We are of the opinion that because this record does not show a patent countersigned by the Recorder, it is not sufficient to prove title in McGarrahan. This makes it unnecessary to consider any of the other questions which have been argued, and the judgment is affirmed.

The Chief Justice delivered the opinion. Justice Field took no part in the decision of this cause.

Nevada Mining Decision.

NORTH CONSOLIDATED VIRGINIA

vs.

J. B. TREADWELL.

The decision in the North Con. Virginia case being of very great importance, together with the probability that other mines are in a similar position as that which caused the defeat of the plaintiff, we give the rulings of the Judge and the leading portions of the argument, as furnished by the *Territorial Enterprise* of the 23th ult.

Judge George Turner, in stating the case to the jury for the defendant, said: "The defendant's grantors located the mining ground in dispute, and upon which plaintiff has sunk a shaft, on the 12th day of December, A. D. 1874, and recorded the claim in accordance with the mining rules, on the same day, and ever since said day, has fully worked the claim as required by law. The plaintiff located the claim after the defendant, to wit., on the 14th day of December, A. D. 1864, and recorded his claim, not within ten days as required by law, but long after, to wit, on the 4th day of January, A. D. 1875. Defendant, for this and other reasons stated, claims to own the property and has applied for a patent therefor, and plaintiff has protested."

Counsel for the plaintiff concluded the evidence for the plaintiff in the case by offering:

First—A certificate of incorporation of the North Consolidated Virginia Mining Company, signed by the Secretary of State of California, Thomas Beck, setting forth that the certificate of incorporation of plaintiff was issued January 28th, A. D. 1875.

Second—A certified copy of the articles of incorporation of plaintiff, showing that the articles were filed by the Secretary of State of California on January 28th, 1875.

Third—A certified copy of the articles as filed with the Recorder of Storey county, Nevada.

Fourth—A certified copy of the Board of Officers of the corporation, filed October 14th, A. D. 1877, with the Recorder of Storey county, Nevada. (Under the statute.)

Counsel for defendant objected—first, that the Act of Congress provided that the attestation of any record from one State to be used in another must show two things: First that the attestation is "in due form of law;" and, second, that it is "made by the proper officer."

Counsel for plaintiff urged that the Statute of Nevada provides that a certificate of any public record, "duly certified in pursuance of law," is to be received as proof of the facts stated. (Act of 1877.)

His Honor Judge Rising held that the signature of the Secretary of State and the Great Seal of the State proved itself, and required no further certificate by the Governor or any other officer. Second, that the certificate signed by the Secretary must conform to the Act of Congress, and must contain the two allegations set forth in the Act of Congress, viz: First, that "it is in due form of law." Second, That "it is made by the proper officer," and hence that a mere certificate, as in this case, that the papers are "correctly copied from the originals" is alone sufficient.

Upon the Statute of Nevada, passed in 1877, the Court held that the law was correct and should be enforced, but that the language of the Statute, "duly certified in pursuance of law," must be interpreted to mean, certified in pursuance of the Act of Congress.

These propositions having been disposed of, the plaintiff offered in evidence a deed from Black to the North Consolidated Virginia Company, dated January 27th, A. D. 1875, and recorded January 27th, A. D., 1875.

To this, counsel for defendant objected that the deed was void, for the reason that the corporation was not formed, so as to receive an estate, until its certificate was filed with the Secretary of State of California, which was not done until January 23th, 1865; hence, the deed was made and recorded a day too soon, there being no corporation to receive it upon January 27th. and that the deed must be taken to have been delivered the day it was recorded with the knowledge and consent of the grantees.

After a full and thorough argument of over four hours, and a full citation of authorities, the Court held that the deed must be taken as delivered the day it was filed for record, and that the deed conveyed no estate, there being no corporation duly formed January 27th; that the corporation was formed on the 28th of January, and hence the deed made January 27th was premature and void; that, being void and not voidable it could not be cured, and no estate passed; hence that there was no corporation and no estate passed; and the plaintiff could not recover, as the plaintiff received no conveyance and does not own the land and mine, and hence cannot recover.

Upon these rulings, counsel for defendant moved for a non-suit, and that judgment be rendered for defendant. This motion the Court sustained, and ordered judgment for defendant, and that plaintiff pay the jury fee, \$180, and all costs. Thus ended a very important case, involving the title of a mine es-

timated at a great value, and a shaft that the evidence shows to be worth over \$500,000.

The attorneys for plaintiff were Judge Belknap and Messrs. Kirkpatrick & Stephens, and for defendant, ex-Chief Justice Turner and Messrs. Lewis & Deal.

The above decision is one of the most important rendered by a Nevada Court, and should the plaintiff be refused a new trial, the position of the parties will be in this condition: In case the North Con. Virginia Company decides upon an appeal, she will be forced to give a bond for double the value of the improvements, and for damages that might be sustained. As, by themselves, the value of the improvements is placed at \$500,000, this alone, on appeal, would make the bond required *one million dollars*, and add to this the damages that might accrue, the entire sum would probably be in the neighborhood of one and a quarter million dollars. It is hardly probable that the case will be appealed if a new trial is refused, the bond required being too large to risk upon the mine. The reason we have placed such stress upon the North Consolidated Virginia decision is because the Justice mine is similarly situated toward the Rough and Ready, and is a forerunner of the decision which will be given when the case between these companies is decided, which the Rough and Ready people are making every preparation for an early bringing it before the courts.

Recent U. S. Land Decisions.

MINES AND MINERALS.

State of California vs. Poley & Thomas.

THE title to school sections vests in the state upon survey thereof if the mineral character is unknown at that date.

DEPARTMENT OF THE INTERIOR, }
WASHINGTON, D. C. }

To the Commissioner of the General Land Office:—

SIR: I have considered the case of the State of California vs. L. J. Poley and Henry Thomas, involving the right to the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 36, Township 3 South, Range 13 East, M. D. M., Stockton, California, on appeal from your decision of June 26. 1875.

The State claims under the school grant, Poley and Thomas apply for a patent under the mining act. The township was surveyed in December, 1854 and the plat was filed in the local land office March 14, 1855. The placer mining claims appear to have been located in the year 1858.

It will thus be seen that the question presented is, whether

the State of California has a legal title to the land in sections 16 and 36, where it is ascertained, after the survey and identification of said sections that the land therein is mineral.

By the sixth section of the act of March 3, 1853, the sections above designated were granted to the State of California for school purposes, and when the lands were surveyed the title of the state attached to the same, and if there was no legal impediment, became a legal title. (18 Howard 173.)

After a very elaborate discussion, my predecessor, Mr. Secretary Delano, held that Congress, by the act of 1853, did not intend to grant, and did not grant, to the State any mineral lands, which by survey are shown to be in sections 16 and 36. (Copp's Mining decisions, p. 109.) Accepting this conclusion as the correct one, the question still remains, did the title to lands in said sections vest in the State, upon survey, if their mineral character was unknown at that time, and the same were regarded by the officers of the government as ordinary public lands, not reserved, or otherwise appropriated, but subject to disposal under the general laws of the United States.

It must be held that it did so vest, unless there was an express prohibition existing by virtue of some law.

It would seem that it was the intention of the framers of the act not to grant any of the mineral lands to the State. Mr. Hall said in the House of Representatives, on the day of its passage, "There are some donations made to the State of California, but they are precisely the same as those made to the other States of the Union; but in the clauses making the donation it is provided that the mineral lands and the lands reserved for other public uses shall be excepted. Mineral lands are reserved in all cases." Cong. Globe, vol. 26, p. 1038.

In support of this theory the 12th section of the act may be cited. By its provisions, 72 sections of land were granted to the State for the use of a seminary of learning, and mineral lands were excepted; but it will be observed that the lands were to be selected by legal subdivisions; and by an express provision in section three of the act, none but township lines were to be surveyed when the lands were mineral, hence the prohibition was well defined and easily followed. The same remarks will apply to the grant made by section 13 of the act, for the purpose of erecting the public buildings of the State.

By the sixth section of the act under consideration, all the public lands in the state of California were declared subject to the pre-emption laws, except "sections 16 and 36, which

shall be and hereby are granted to the state for the purpose of public schools in each township" ° ° There appear to be no words of limitation or restriction in the clause making the grant. The words are absolute and unqualified; the sections are excepted from the operation of the pre-emption law, together with lands otherwise appropriated or reserved by competent authority, or claimed under a foreign grant, and mineral lands; but I know of no rule of construction of language that would justify an interpretation of the words used in the granting clause that would in effect be a limitation of said grant. This view does not, I think, conflict with that expressed by Secretary Delano; for by section 3 above cited, lands known to be mineral could not be legally surveyed or designated as school lands. In compliance with the doctrine established by the courts, it must, I think, be held that the title vested in the State at the date of survey, when the land was not known to be mineral or was not treated as such by the Government.

If following the doctrine of the courts the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be effected? If for three years, why not for ten or fifty, or after the title derived from the State has been transmitted through numerous grantees? For lands confessedly non-mineral at the date of survey, may, many years thereafter, be ascertain, through the improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might result in placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly-expressed provisions of law. In my opinion there is nothing in the act which can thus be interpreted. I must therefore hold that the discovery of the mineral character of land in sections 16 and 36, subsequent to survey, does not defeat the title of the State to the same as school land. The case of *Sherman vs. Buick* (45 Cal. 656) is cited by counsel. In this case, the Court held that the title to each sixteenth and thirty-sixth section; upon its being surveyed, vests absolutely in the State." This decision was reversed by the United States Supreme Court at the present term.

After a careful examination of the case, however, I do not think that the question of the title of the State to mineral lands is involved, or that the decision in any way affects the question.

It is not intended to assert that the title to the land in said sections passes to the State upon the survey under the provisions of the acts of July 26, 1866, and July 9, 1870, said lands at the date of survey being recognized and regarded as mineral.

The views expressed by Secretary Delano, before referred to, will continue to control the Department in the disposal of lands thus designated.

There are other questions presented in the case under consideration, but if the views above expressed are correct, their consideration is not called for.

Your decision is reversed, and the paper transmitted with your letter of September 10, 1875, are herewith returned.

Very Respectfully,

C. SCHURZ, Secretary.

—Copp's Land Owner.

TESTIMONY IN LAND CASES.

Decision Reversed by Secretary Schurz—Action Suspended.

WASHINGTON, May 26th.—Representative Page having received numerous letters from constituents complaining that all testimony as to the mineral or agricultural character of the land in contest between miners and the claimants under alleged railroad titles, was required to be taken before Registers and Receivers, to the great inconvenience of citizens residing at a distance from the Land Office, secured a decision from the Commissioner of the General Land Office some months ago that the testimony in such cases might be taken before any State officer authorized to administer oaths. The case in which this ruling was incidentally made having been appealed, Secretary Schurz reversed the entire decision of Commissioner Williamson, but, upon Page's representation, yesterday agreed to suspend his action on the case, with a view to giving the point as to the inconvenience complained of, his careful consideration. It is thought probable that the ruling of the General Land Office on this point will be finally sustained.

—Record-Union Special.

THE HASTINGS LAW COLLEGE.

The facts connected with the endowment of the Law College by Judge Hastings have already been given to the public. Below we give the act of incorporation, a manuscript copy of which has just reached us ;

An act to establish Hastings College of the law in California :

Section 1. That S. C. Hastings be authorized to found and establish a Law College to be forever known and designated as "Hastings' College of the Law."

That the officers of said College shall be a Dean, Registrar and eight Directors. That the Directors shall be Joseph P. Hoge, W. W. Cope, Delos Lake, Samuel M. Wilson, O. P. Evans, Thos. B. Bishop, John R. Sharpstein, Thomas I. Bergin of the Bar Association of the city of San Francisco, who shall, when vacancies occur, fill the same from members of said Association or otherwise, and shall always provide for filling a vacancy with some heir or some representative of the said S. C. Hastings.

That the Dean and Registrar shall be appointed by the Directors.

Sec. 2. Said College shall affiliate with the University of the State upon such terms as shall be for the welfare of the College and University, and shall be the law department of the University.

Sec. 3. The Faculty of the University shall grant diplomas to the students of the College, and the President shall sign and issue the diplomas.

Sec. 4. There shall be set apart for the use of the students of the College some room or suitable hall at the University. And the Board of Supervisors of the city of San Francisco is authorized to supply a suitable hall in the city of San Francisco for the students and Directors.

Sec. 5. The Dean of said college shall be *ex-officio* one of the Faculty of the University to be designated as such by the Directors of the College.

Sec. 6. The Diploma of the students shall entitle the student to whom it is issued to a license to practice in all the Courts of this State, subject to right of the Chief Justice of the State to order an examination as in ordinary cases of applicants without such Diploma.

Sec. 7. This act is passed upon the condition that said S. C. Hastings shall pay into the State Treasury the sum of \$100, 000, and is never to be refunded except as hereinafter provided.

Sec. 8. The sum of 7 per cent. per annum upon \$100, 000, is to be appropriated by the State and paid in two semi-annual payments to the Directors of the College.

Sec. 9. The business of the College shall be to afford facilities for the acquisition of legal learning in all branches of the law. And to this end shall establish a curriculum of studies, and shall matriculate students who may reside at the University of the State as well as students residing in other parts of the State.

Sec. 10. Professorships may be established in the name of any founder of such Professorships who shall pay to the Directors the sum of \$30, 000.

Sec. 11. All the business of the college shall be managed by the Directors without compensation. And all officers, acting including the Dean and Registrar, shall be appointed by the Directors and removed by them.

Sec. 12. The Law Library Association of the city of San Francisco shall grant to the students, the use of their library upon such terms and conditions as they may agree with the directors of the college.

Sec. 13. The object of this Act being to grant a perpetual annuity for the support and maintenance of said College, should the State or any Government which shall succeed it fail to pay to the Directors of said College the sum of seven per cent per annuum as above stipulated, or should the college cease to exist, then the State or its successor shall pay to the said S. C. Hastings, his heirs or legal representatives, the said sum of \$100, 000, and all unexpended accumulated interest. Provided that such failure be not caused by mistake or accident, or omission of the Legislature to make the appropriation at any one session.

Sec. 14. That the Chief Justice of the Supreme Court of the State, or if there be no such officer of that name, the chief judicial officer of the State or Government, shall be the President of the Board of Directors, five of whom shall be a quorum to transact all business.

Book Notice and Review.

AN EPITOME OF FEARNE, ON CONTINGENT REMAINDERS AND EXECUTORY DEVICES.—Intended principally for the use of students. By Wm. M. Coleman.

This new and valuable work,—just issued (1878) by the well known publishing house of T. & J. W. Johnson & Co., of Philadelphia, 535 Chestnut street, has just reached us,—among the first, we think, that has arrived on the coast.

We take great pleasure in calling the attention of our readers to its special value as a complete abstract of Fearne,—designed primarily for the use of students, and also of much value to lawyers engaged in active practice. An acquaintance with Fearne is almost indispensable to a thorough knowledge of the common law as relating to real property. This contains all of his principles separately and distinctly set forth,—and under each principle is given a single simple case by way of example, in illustration. It contains 100 pages, beautifully printed on tinted paper with a complete and exhaustive analysis and a full index of subjects. It is neatly bound in muslin, and we opine the price is quite moderate, though it is not given. It is always open for reference or examination on the RECORD office table.

THE NOTARIES' JOURNAL,—The full vol. 1, of this valuable quarterly has reached us,—covering the year from February, 1877, and completing our file to the present. It always fills an important corner on the RECORD table.

THE LEGAL REPORTER, of Nashville, Tenn., for June, has promptly arrived, and contains a very valuable article in the "Inaugural Address of Hon. A. Caruthers, Professor of Law in Cumberland University."

THE PITTSBURG LEGAL JOURNAL, (from the smoky city)—No. 41 of Vol. 8, New Series, (Vol. 25 of old series, established in 1853,) has reached the RECORD table, and is quite welcome. It is published every Wednesday, at \$3 per annum—John S. Murray proprietor; and is the official paper for publication of legal notices, etc., for all the Courts of that region. We congratulate you Bro. Journal, and hope to sometime fare the same.

A tiny "Ray" has struck us from the far away City of Naperville Ills. which bears evidence (though small in proportions) of the enterprise and intelligence of the boys of that ambitious City. The "Ray" is a double sheet of tinted paper, 5 by 7, neatly printed, and if we were allowed to prophesy for its future, we should say, judging from the present number (No 4 of Vol. 1.) that it seems imbued with sufficient inborn vigor to progress in strength, and enlarge in size until it shall become an honor to the City of its birth and take a prominent place in the literary world. We welcome our little friendly "Ray" to the RECORD office.

There are rays of light that fade away,
There are rays of hope that often die,
But rays of honor and truth for aye
Will gleam from noble manhood's eye.

CALIFORNIA LEGAL RECORD.

VOL. I.

JUNE 8, 1878.

No. 11

Legal Notes.

"DAILY LEGAL RECORD" PROSPECTUS,—Our last cover page contains a prospectus of the DAILY which we propose to start on July 1st?—placing all the calendars on one face of the sheet, for convenience of reference,—and the price to be at the low figure of 85 cts. for 4 weeks, or, *with the weekly RECORD*, \$1. 35 for 4 weeks, if paid in advance.

JUDGE GEORGE TURNER was serenaded at the International Hotel, Virginia City, on his return to Nevada, after an absence of thirteen years. In a speech he declared his intention of spending the remainder of his life in Nevada. He had traveled in all parts of the world, and spoke very highly of England and the English people.

THE HASTINGS LAW COLLEGE—By a pleasant coincidence, we published in our last issue, the Act of incorporation of the "Hastings Law College." It is now with pride as well as pleasure that we record its formal transfer to the State University, on June 5th,—as an important feature of the commencement exercises,—in a most happy and instructive address by its munificent donor.

After an announcement of its founding and endowment, he presented some of the considerations influencing him;—his desire to diffuse a wider knowledge of the great principles of

jurisprudence, and elevate the standing of the Bar, and perpetuate the purity and dignity of the Bench,—thereby erecting an imperishable monument—a temple of law and intellect—that shall exist coeval with civilization in our fair land. He then proceeded to define his plan, which included a Hall to be furnished by the University at Berkeley, and a similar Hall by the Board of Supervisors at San Francisco, as auxilliary: and designating a professorship of municipal Law.—He suggested a three years course of study, the first two years devoted to abstract and elementary law, the last to codes and practice.

Lectures and examinations at least once each month at San Francisco and the University, but the student to be permitted to pursue his studies where he resides.

Several lecturers were announced as already secured.

Justice Crocker of the Supreme Court replied, to his address; and T. B. Bishop Esq of the San Francisco Bar association, accepted the bequest on behalf of the Board of Trustees in a brief but eloquent address.

DEATH OF A VERY OLD WOMAN.—Los Angeles, June 8.—News was brought to the city this evening that Dona Eulalia Perez de Guillen, reported to be 143 years old, died at her residence near San Gabriel Mission before daylight this morning. A short biography, prepared by Colonel J. J. Warner, and which will be published in the *Los Angeles Herald*, states that the old lady was born at Loreto, Lower California, but in what year is not known. She came to San Diego with her husband, who was a soldier, in the early days of that Mission where she remained a couple of years, when they came to the Mission San Gabriel. The old lady has been a resident of Los Angeles county ever since. Colonel Warner is unable to state the number of her descendants or to give her exact age. Some of her descendants wanted to take her to the Centennial, but an injunction was sued out by other members of the family, who objected to their aged relative being exhibited as an object of curiosity. She has lived at the Mission since, where she has been visited by all tourists.

Supreme Court Unwritten Opinions.

[No. 5614.—Decided April 13, 1878.]

ARCADIA BANDINI DE BAKER, Plaintiff and Appellant

vs.

BENJAMIN AVISE, Defendant and Respondent.

Appeal from Seventeenth District Court, Los Angeles County.

SEPULVEDA, Judge.

ACTION OF EJECTMENT.

The plaintiff held title to a share of the "Rancho San Antonio" from Felipe Lugo, to whom it was deeded by his father, the original owner, before confirmation of title by patent from the U. S. The patent, when issued, enlarged the boundaries of the rancho, adding 1022 acres of land on the outside. This was partitioned among the seven heirs,—plaintiff receiving the one-seventh share of Felipe. Decided that plaintiff is not entitled to the *whole*, as claimed to belong to the said first share, by reason of the corrected exterior boundary lines.

STATEMENT OF THE CASE.

The plaintiff,—the wife of R. S. Baker,—claims the ownership of 1022 acres of land, adjoining the eastern boundary of the city of Los Angeles, (and being a part of the Rancho San Antonio,) by the following title:

Antonio M. Lugo, claiming the Rancho San Antonio, presented his petition for confirmation in 1852 to the U. S. Board of Land Commissioners, for Mexican Claims, and received his patent in 1866. But meantime, (in 1855) he had a survey made of the Rancho, as he then understood the exterior lines to be, and designated certain particular tracts to be conveyed to his children by deed.

To one son, Felipe Lugo, he conveyed a particularly described tract, bounded on the north and west sides by the said exterior lines of the Rancho, as then understood, and containing 6,102 acres.

In 1857, Felipe Lugo sold and conveyed his right and interest in said land to Louis Phillips; and he in turn sold it to Arcadia Bandini de Stearns (the plaintiff, but then wife of Abel Stearns) for \$4000, and which land so remained to her in the settlement of the Stearns estate. But the U. S. patent for the entire Rancho, when issued, changed the exterior boundary lines, so that a strip of land—of 1022 acres.—was added *outside* the former boundary, of which, plaintiff claims, the part now in contest, should have followed her title.

In 1860 Antonio M. Lugo died, leaving a will by which his widow became sole residuary legatee of all lands of the Rancho not before conveyed away. In 1869, the widow died, intestate, leaving seven children heirs, among whom was divided by a partition suit, the said overplus residuary land, and by which the plaintiff obtained the one-seventh share which should have gone to Felipe Lugo. Hence, defendant, Benj. Avise, who claims title through one of the seven heirs, (Emilda Lugo) pleads that plaintiff is, by that partition,—which was then accepted by her—estopped from any further claim in this action.

The plaintiff claims that in the partition suit she only appeared as executrix of the estate of Abel Stearns, and has a still additional individual claim. And further, that she had maintained continuous occupation up to January 12, 1876.

Upon trial of the cause, judgment was given for defendant. Motion was made for a new trial upon a statement of the case, which was denied on March 5, 1877;—from which and the judgment, appeal was taken March 12, 1877.

Judgment and order now affirmed.

Brunson, Eastman & Graves, attorneys for plaintiff and appellant.

Glassell, Chapman & Smiths, attorneys for defendant and respondent.

Circuit Court of the United States.

DISTRICT OF OREGON.

[No. 373.—Decided April 22, 1878.]

TOWN vs. DEHAVEN, ET UX., ET AL.

Suit in Equity for Conveyance from Patentee.

- (1) **BRITISH SUBJECTS—RIGHTS OF, UNDER OREGON TREATY OF 1846.** David Gervais, the husband and father of plaintiff's vendors, was a British subject, in the occupation of 640 acres of land, under the provisional government of Oregon at the date of the Oregon treaty of June 15th 1846, and continued in the actual possession of the same until his death in 1853, when his widow and administratrix made a claim under said treaty for the premises for herself and children in the surveyor general's office, and made proof of these facts, but her claim was disregarded, and the land taken up under the donation act by the defendants, and patented to them by the U. S. in 1866. *Held* (1), that the stipulation in the treaty by the U. S., that it would respect "the possessory right" of Gervais was not a grant, but a mere promise which, of itself, conferred no right to or in the soil, and for the violation of which Gervais would only have a claim against the United States for com.

pensation in money or kind; (2) *Seemle*, that by the proviso to § 4 of the donation act of September 27, 1850, congress declared that Gervais was entitled to a grant of the land occupied by him as a possessory right, but provided no means by which he could claim the same or make proof of the facts necessary thereto before the land department of the country.

(2) STATE STATUTES OF LIMITATION. The ruling in *Hall vs. Russell*, 3 Saw., 514 followed and applied in this case.

DEADY J.

This suit is brought by the complainant, a citizen of the state of New York, to obtain a conveyance from the defendants of a certain tract of land situate in Marion county, Oregon, and being parts of sections 29 and 30, in township 5 south, range 2 west, Wallamet meridian, containing 640 acres of the value of more than \$5,000.

The material facts are allegations contained in the bill are briefly: That David Gervais, a British subject, who was born in Oregon Territory in the year 1816 and died therein on August 22, 1853, settled upon the premises in November, 1845, while said territory was still in the joint occupation of Great Britain and the United States, and occupied and cultivated the same until his death; that said David died intestate, leaving Mary Ann Gervais, to whom he was married in 1841, as his widow, and two children, Margaret Gay, and Frank Gervais as his sole heirs at law; that said Mary Ann was duly appointed administratrix of the estate of the deceased, and as such administratrix, on behalf of herself and said children, did on November 10, 1853, notify the surveyor-general of Oregon of the claim of said estate to the premises, and that she claimed the same "as the possessory right" of the deceased by virtue of the treaty with Great Britain of June 15, 1846, in regard to limits westward of the Rocky mountains, and at the same time filed with said surveyor "the necessary proofs" of these facts; that said widow and children thereupon "became the owners of said premises and entitled to a patent therefor, and to full protection of their possessory rights under the laws of the United States and the treaty aforesaid;" that no patent has ever issued to said widow or children, nor have their possessory rights been otherwise respected, but the same has been denied and a patent to the premises issued by the United States on September 6, 1866, to the defendants, Andrew Dehaven, Polly, his wife, who, with the defendants, William Dehaven and Michael Fahy, to whom said Andrew and Polly have conveyed an interest therein, claim the whole of said lands as their own, excepting 100 acres, claimed in his own right by the defendant Earle; and, that said widow and children inherited the premises from said David Gervais and have since conveyed the same to the complainant, who is now the owner thereof.

The defendant demurs to the bill for sundry causes. The fifth and last cause is a want of equity. In support of this, it is maintained that the *possessory right* guaranteed to David Gervais by the third article of the Oregon treaty of June 15, 1846, (U. S. Pub. Treat., '321), terminated with his death in 1853, citing *Cowen vs. Hannah*, 3 Or., 468.

This article of the treaty reads as follows:—"In the future appropriation of the territory south of the 49th parallel of north latitude, as provided in the first article of this treaty, the *possessory rights* of the Hudson's Bay Company,

and of *all British subjects* who may be already in the occupation of land or other property lawfully acquired within the said territory, *shall be respected*".

At the date of this treaty there were some thousands of American citizens and British subjects settled in the Oregon territory south of the 49th parallel under and by virtue of the third article of the convention of October 20, 1818, commonly and properly called the treaty of "joint occupation," which, in effect provided that the country should be free and open to the "citizens and subjects" of the two governments until otherwise provided. (U. S. Pub. Treat. 299).

The occupation of the territory by these citizens and subjects was regulated by the provisional government—an authority created and sustained by both—during this period. As a rule each male adult citizen and subject was allowed to occupy and possess 640 acres of land so long as he improved and cultivated the same. The settler might *abandon* or dispose of his location and take up another; but in case of his death his possession did not descend or pass to his children or relatives, but the "claim" together with the improvements thereon was disposed of by the administrator as personal property.

This was the "possessory right" which the United States in the future appropriation or disposition of the soil undertook to respect. As a just nation, the obligation to do this was binding upon her independent of the treaty stipulation. (Soulard *vs.* U. S. 4 Pet., 512; Delassus *vs.* U. S., 9 Pet., 133; Mitchell *vs.* U. S. Id., 734; U. S. *vs.* Moreno, 1 Wall., 404.)

Under the provisional government the possessory right of Gervais would have terminated with his death, and his widow and children would not have succeeded him therein, for there was no transmission of possession or right from one occupant to another, but each settler "took up" his "claim," so to speak, *de novo*. If a settler came lawfully into the occupation of land once possessed by another he did not do so as the successor in interest of such other, but the one, for a consideration or any other cause *abandoned* the location, and the other took it up "as though the foot of man had never been upon it." *Lownsdale vs. Portland, I Deady, 14.*

And if this were otherwise the widow and children of Gervais could not have succeeded to his possession, for they, because of the sex of the one and the non-age of the others, were incapable of "holding a claim;" but the value of the "claim" and improvements would have been distributed among them by the intervention of an administrator and sale of the same.

Did the third article of the treaty of 1846, enhance this possessory right, or increase the quantity of the occupants' interest or the duration or time of its enjoyment? Does it contain a grant of some interest in or right to the possession of the soil, or is it merely a promise by the United States to respect an existing right, whatever that might be?

On the one hand, it is hardly probable that Great Britain, while conceding so much as she did to the United States by that treaty, would also surrender her subjects, who had settled here upon the faith of her claim to the country, without taking some sufficient security or stipulation as to their possessions, upon which many of them had spent years of labor and care to make permanent homes for themselves and families. The possessory rights of the Hudson's Bay Company provided for in the same article were of no higher character and

hardly as meritorious as those of these British subjects. Yet the two governments, by the convention of July 1st 1863 (U. S. Pub. Treat., '346), declared that it was desirable that all questions concerning "the possessory rights" of said company should be settled by the transfer of the same to the government of the United States for an adequate money consideration, and provided for an arbitration to ascertain the value thereof, upon which \$450, 000 was awarded to the company.

Yet the language used in the treaty—*possessory rights shall be respected*—does not of itself indicate that any new or additional right was intended to be conferred thereby, but only that the existing right of possession, as defined by the local law, should be respected—regarded, not infringed or denied without due process of law. Upon its face the stipulation appears to be a mere promise, which of itself confers no right to or in the soil, and for the neglect or violation of which the British subject would only have a just claim against the United States for compensation in money or kind. The legal power of the government to dispose of the territory south of the 49th parallel as it saw proper was not limited by the treaty, and belonged to it thereafter as an incident of its sovereignty. The possessory right that it bound itself to respect was probably only that which the British subject then enjoyed under the local law, which practically terminated with his life. In *Cowenia vs. Hannah*, supra, Mr. Justice Boise says: "The treaty of 1846 treated these lands as they then were; and had the parties intended to raise these possessory rights to a higher title, it would have been so provided. I think these possessory rights should cease on being abandoned, so that the possessor became disseised by his own voluntary failure to occupy; or, on his death, as such rights could not descend to heirs."

Yet, it is probable that justice required that the United States should have shown the same respect to the possessory rights of British subjects that it did to those of its own citizens in like circumstances. By § 4 of the donation act—September 27, 1850—the possessory rights of the American citizens then in the territory were confirmed to them in perpetuity. It is also true that all aliens having such possessory rights were entitled by the act to the benefit of this grant; but this was upon the condition that they should first become American citizens. Probably, by much the larger portion of the British subjects having possessory rights in the territory embraced this offer, and obtained title to the lands which they then occupied by becoming American citizens.

But this act, by means of which the United States first undertook to appropriate—dispose of—the territory—lands—south of the 49th parallel, made no provision for ascertaining and protecting the possessory rights of British subjects, *as such*. In this respect it seems to have been framed in studied disregard of the treaty stipulation; except so far as the following proviso to said § 4 may have the effect to preserve them—"that this shall not be so construed as to allow those claiming rights under the treaty with Great Britain, relative to Oregon territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a *single grant of land*;" and this proviso to § 11 of said act arbitrarily appropriating—

confiscating—the possessory right of Doctor John McLoughlin, a British subject, to the endowment of a university—"That nothing in this act contained, shall be so construed or executed, as in any way to destroy or affect any *rights to land* in said territory, holden or claimed under the provisions of the treaty or treaties existing between this country and Great Britain."

But admitting that the possessory right guaranteed to a British subject by the treaty of 1846 amounted at most to a freehold or a right to occupy the land during the life of the settler, the question arises whether this proviso to § 4 does not have the effect to constitute it a grant of land, the same as that made to American citizens or aliens who should become such. The proviso declares that it was not the intention of congress to allow a settler to claim under the act and the treaty both, but only to secure him the election to *take a grant of land* under either.

But the act made no provision for a British subject asserting a right to land under the treaty or otherwise, and therefore any one who did not choose to become an American citizen and claim under the act, as such, had no opportunity to give notice to the surveyor general of his right or establish the facts constituting it. The result was that the right of the occupant was practically extinguished by his death, and those of his widow and children, if any, were ignored. For instance, David Gervais, being born in Oregon, of British subjects, while the territory was in the joint occupation of the United States and Great Britain under the treaty of 1818, was a British subject, (*McKay vs. Campbell*, 2 Sawyer, 122). At the date of the treaty of 1846 he was in the lawful occupation of 640 acres of land in the Oregon territory. By this treaty the United States agreed that in the future disposition of this magnificent domain his right to this land should be respected. By the act making such disposition, persons in his condition were recognized as being entitled to a grant of land, but no provision was made therein by which he or any one claiming under him could assert or establish his claim in the land department of the country. The consequence was, that upon his death the land upon which he had lived for years, and upon which he may have expended the labor and savings of a lifetime to provide a permanent home for his wife and children, was taken by the defendants—the DeHavens—under the donation act, and acquired by them from the United States as a part of the public domain. That this result is far short of what might have been expected from the justice, not to say the magnanimity, of a great nation in dealing with the rights of humble and helpless individuals over whom it had acquired jurisdiction upon the faith of a solemn pledge that it would respect such rights, will hardly be denied.

But whether in this state of the law, the widow and children of Gervais succeeded to any rights which can be enforced as against these defendants in a judicial proceeding is a matter of which I have serious doubt.

Upon the whole my mind inclines to the conclusion that the treaty stipulation was not a *grant*, but a mere *promise* to respect an existing right of possession which strictly speaking amounted to no more than a freehold, or an estate for the life of the settler, and that the United States in disposing o

the territory by the donation act, construed and recognised the right of the British subject to a grant for his possession the same as an American citizen, but provided no means nor prescribed no mode in which such right could be asserted or established in the land department.

But as this case can be satisfactorily disposed of upon another point made by the demurrer, it is not necessary to consider this question further.

The (3) and (4) causes of the demurrer are in effect that the alleged cause of suit is barred by the lapse of time because suit thereon was not commenced within the time limited by § 378 of the Or. Civ. Code, which, among other things, prescribes that no suit in equity "shall be maintained to set aside, cancel or annul, or otherwise affect a patent to lands issued by the United States * * * or to compel any person holding under such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust for or to the use and benefit of such plaintiff, for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent or within one year from the passage of this act."

The act referred to in this section was passed October 20, 1870, and the patent to the defendant was issued on September 6, 1866. This suit was commenced on October 1, 1877, nearly 6 years after the time limited by this act, and more than eleven years after the date of the patent. The case falls within the purview of the statute. It is a suit to compel the defendants, holding under a patent from the United States to convey the lands described therein to the plaintiff on account of certain matters, to-wit, the possession and occupation of Gervais, which transpired prior to the date of such patent.

While this § 378 is not binding upon this court, it has been held to furnish a convenient and safe rule for its action in a similar case. *Hall vs. Russell*, 3 Saw., 514. In that case the court said:

An action at law to recover possession of this property would not be barred by the laws of this state under twenty years. Whether the court shall follow that statute or the limitation of five years contained in § 375, *supra*, is the question. It is conceded that, in a case of equitable cognizance like this, the court is not bound by the statute of limitations, but may, for good reason, apply a longer or shorter time in bar of a suit. There is nothing in the circumstances of this case or the period fixed by the statute which requires the court to lengthen the term, but the contrary. * * * * * The patent was issued nearly ten years ago. * * * * * No reason is given for the delay; nor does it appear that the plaintiffs have been deceived or misled in any way by the defendants, or in anywise induced to forbear the assertion of their alleged rights. There never was any actual relation of trust or confidence between these parties. They claim under titles adverse in their origin, and have always occupied the attitude of adverse claimants.

Under these circumstances, we think that the court ought to apply the shorter limitation of the two. Statutes of limitation are measures of public policy and expediency, and it is desirable that the rule should be the same in the national and state courts. We think in this case the court may safely adopt the limitation prescribed by the laws of the state in its courts in like case."

Whatever may be thought of the manner in which the United States has kept its engagement, to respect the right of Gervais to this land, there is no apparent reason why those who claim under him should not have sought redress in the courts before this. This has become a stale claim. There has been an unreasonable delay in asserting the right claimed. The case falls within the rule applied in *Hall vs. Russell*, *supra*, and the bill must be dismissed.

Addison C. Gibbs, for the complainant.

E. C. Bronaugh, for the defendant.

Supreme Court of the United States.

CLIFTON H. MOORE ET AL., Plaintiff in Error,

vs.

RUFUS W. ROBBINS.

In Error to the Supreme Court of the State of Illinois.

1. A patent for any part of the public lands, when issued by the land department acting within the scope of its authority, carries with it, when delivered and accepted by the grantees, the legal title to the land, and with it passes all control of the executive department of the government over the title.
2. If any lawful reason exists why the patent should be cancelled or rescinded, the appropriate and only remedy is by a bill in chancery, in a court of competent jurisdiction, brought by the government, and there exists, no power in the Secretary of the Interior or any other officer of the government to reconsider the facts on which the patent issued, and to recall or rescind it, or to issue another for the same land.
3. But when fraud or mistake or misconstruction of the law of the case exists the United States, or any contesting claimant for the land, may have appropriate relief in a court of equity.
4. Under the 14th section of the act of 1841, 5 Stat., 457, and the act of March 3, 1853, 10 Stat., 744, no pre-emption was of any avail against a purchaser of the land at the public land sales, unless the pre-emptor had proved up his settlement and paid for the land before the commencement of the public sales as ordered by the President's proclamation.
5. The decision of the Secretary of the Interior in favor of a pre-emption claimant under such circumstances against a purchaser at the public sales, held to be erroneous as a misconception of the law, and the equitable title decreed belong to the latter.

Mr. Justice Miller delivered the opinion of the Court.

This case is brought before us by a writ of error to the Supreme Court of the State of Illinois.

In its inception it was a bill in the Circuit Court for DeWitt County, to foreclose a mortgage given by Thomas I. Bunn to his brother Lewis Bunn, on the south half of the southeast quarter and the south half of the southwest quarter of section

27, township 19, range 3 east, in said county. In the progress of the case the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land, and they were made defendants and answered.

Moore said that he was the rightful owner of 40 acres of the land mentioned in the bill and mortgage, to wit, the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, and had the patent of the United States giving him the title to it.

Davis answered that he was the rightful owner of the southeast $\frac{1}{4}$ of said southwest $\frac{1}{4}$ of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the President for that district, and paid for it, and had the receipt of the register and receiver, and that it was afterwards sold under a valid judgment and execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen that while Moore and Davis each assert title to a different 40 acres of the land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchase from the United States, and since their rights depend upon the laws of the United States concerning the sales of its public lands, there is a question of which this court must take cognizance.

As regards Moore's branch of the case it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over \$2.50 per acre, at a public land sale, by the officers of the land district at Danville, Ill., November 15, 1855. That his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in favor of Bunn, whereupon Moore appealed to the Commissioner of the General Land Office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the commissioner to the Secretary of the Interior, who reversed the commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the land department did not venture to issue another for the same land; and

so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver, and that taken in the present suit, any just foundation for Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted for the present, it follows that Moore, who has the legal title, is in a suit in chancery decreed to give it up in favor of one who has neither a legal or an equitable title to the land.

The Supreme Court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore, on the ground that to the officers of the land department, including the Secretary of the Interior, the acts of Congress had confided the determination of this class of cases, and the decision of the secretary in favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of the contest, the courts are bound by it and must give effect to it.—(Robbins vs. Bunn, 54 Ill. R. 48.)

Without inquiring for the present into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case. While conceding for the present to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the executive department of the government. A moment's consideration will show, that this must in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver, and commissioner are created mainly for the purpose of supervising the sales of the public lands, and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public do-

main. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States and signed by the President, is delivered to and accepted by the party, the title of the government passes this delivery. With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course.

"A patent," says the court in *United States vs. Stone*, 2 Wall., 535, "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles until it is set aside or annulled by some judicial tribunal. In England, this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy."—(See, also, *Hughes vs. United States*, 4 Wall., 232; same case, 11 How., 568.)

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President and sealed and delivered to and accepted by the grantee. It is a matter of course that after this is done neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating and in many cases unreliable action of the land office. No man could buy of the grantee with safety,

because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists when does it cease? There is no statute of limitations against the government, and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the Secretary of the Interior, therefore, in Moore's case was made without authority and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United States. It is not denied, however, that to one or the other of the parties now before the court this title equitably belongs, and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis, to wit, November 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the 20th day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver and assert a right by reason of a pre-emption commenced on the 8th day of November, 1855, to pay for the south $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side and Moor and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers in favor of Bunn, and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the Secretary of the Interior, reversing the commissioner, decided in favor of Bunn. But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore, and the secretary, therefore, had the authority undoubtedly to decide

finally for the land department who was entitled to the patent. And though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The Supreme Court of Illinois, in their opinion in this case, (54 Ill. R., 50,) after citing some ten or twelve decisions of their own court, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties. It is a little singular that, while the question thus decided by that court was a question of federal law, and while there existed at that time many reported decisions of this court. from *Garland vs. Wynn*, in 20 Howard, down to *Silver vs. Ladd*, in 7 Wallace, on that point, none of them are referred to by the court or by counsel.

The whole question, however, has been since that time very fully reviewed and considered by this court in *Johnson vs. Towsley*, 13 Wall., 72. The doctrine announced in that case, and repeated in several cases since, is this:

That the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief.

In the recent case of *Shepley vs. Cowan*, 91 U. S. R., 340, the doctrine is thus aptly stated by Mr. Justice Field: "The officers of the land department are specially designated by law to receive, consider and pass upon proofs presented with reference to settlements upon the public lands, with a view to secure the right of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts when a controversy arises between private parties founded upon their decisions; and for mere errors of judgment up-

on the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the land department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of Atherton vs. Fowler, we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy the act of September 14, 1841, which for the first time established the general principle of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settlements on the public lands as soon as the surveys were completed and filed in the local offices, affixed to such a settlement, two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the 14th section of that act:

"This act shall not delay the sale of any of the public land of the United States beyond the time which has been or may be appointed by the proclamation of the President, *nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required, before the commencement of the sale aforesaid.*"—(5 U. S. Stat., 457.)

There can be no misconstruction of this provision, nor any doubt that it was the intention of Congress that none of the liberal provisions of that act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price before the commencement of the sales ordered by the President's proclamation. We do not decide, because we have

not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the act of 1841, though part of it is found in the Revised Statutes, §2,282, as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure that it was in full operation at that time. The act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at \$2.50 per acre, *before they should be offered for sale at public auction*.—(10 U. S. Stat., 244.) This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons who had already settled on such alternate sections, and it may be doubted whether any right of pre-emption by a settlement made afterwards, existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it required, in any event, that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that while Bunn's pre-emption claim comes directly within the provision of both statutes, they were utterly disregarded in the decision of the Secretary of the Interior, on which alone his case has any foundation.

We have no evidence in this record at what time the President's proclamation was issued, or when the sales under it began at which Mitchell purchased. These proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are *never* offered at public auction until after a proclamation fixing the day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest, at public auction. That they were struck off to them a few cents in price above the minimum of \$2.50, below which these alternate sections could not be sold, and that this was on the 15th day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week or two weeks, as the sales often continue open longer than that.

Bunn states in his application, made three months after this, that his settlement began on the 8th of November, 1855. It is not apparent from this record that he ever gave the notice

of his intention to pre-empt the land by filing what is called a declaration of that intention in the land office. There is a copy of such a declaration in the record accompanying the affidavit of settlement, cultivation and qualification required of a pre-emptor, which last paper was made and sworn to February 20, 1856, when he proved up his claim and paid for and received his certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the record, it is very clear that Bunn "failed to make proof of payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the act shall be available to any person who fails to do this. The affidavit and payment of Bunn were made three months after the land sales had commenced and after these lands had been sold.

The section also declares that the act shall not delay the sale of *any public land* beyond the time which has been or may be appointed by the proclamation of the President. To refuse Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one; vesting in them the equitable title, with right to receive the patents, and that the subsequent proceeding of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the court in Illinois, sitting as a court of equity, to have declared that the mortgage made by Bunn, so

far as these lands are concerned, created no lien on them because he had no right, legal or equitable, to them.

The decree of the Supreme Court of that State is, therefore, reversed, and the cause remanded to that court for further proceedings in accordance with this opinion.

True Copy—Test:

D. W. MIDDLETON;
Clerk Supreme Court United States.

SYLLABI OF THE

Supreme Court Commission of Ohio.

(May 29, 1878.)

[Action for Slander.]

JOHN G. DUVAL vs. HANNAH DAVEY and JOSEPH DAVEY.

ASHBURN, J.:

1. Where words defamatory of the character of a married woman are published in the presence and hearing of her husband, he is a competent witness to prove the speaking of the words in an action of slander brought by husband and wife.

2. In an action of slander by a woman, where the alleged defamatory words impute to her a want of chastity, specific acts of sexual intercourse by her cannot be given in evidence, for any purpose, under the issue made by a general denial.

3. Where the slanderous words set out in the petition charged the plaintiff, a female, with a want of chastity, under such issue it is competent, in mitigation of damages, to show that plaintiff's general reputation for chastity at and prior to the speaking of the words was bad. *Dewitt vs. Greenfield* 5. O., 225, overuled.

Judgment reversed.

Wright, J. dissents to the second point in the syllabus.

[Equity of Redemption.]

ELIZA A. SHAW vs. HORACE S. WALBRIDGE.

WRIGHT, J.:

1. A deed having been given, absolute upon its face, the grantor claimed it was a mortgage, in a proceeding to establish that claim, it was competent for the grantee to show, that although originally a mortgage the equity of redemption had been released by a parole agreement.

2. There is no rule of law which prevents a mortgagor from disposing of his equity of redemption to a mortgagee by private arrangement, but courts of

equity will not permit a mortgagee to take advantage of his position so as to wrest from the mortgagor his equity, by an unconscionable bargain. The transaction will be jealously scrutinized, but if the agreement was a fair one, under all the circumstances of the case, it will be upheld. Judgment affirmed.

Book Notice and Review.

THE CLEVELAND LAW REPORTER.—No. 21 of Vol. 1, of this live paper has come to us.—Is published every Saturday by J. G. Pomerene Editor and Proprietor.—8 Pages Octavo size.—Terms \$3. per year in advance. Reports the Ohio supreme court decisions, and looks especially after all legal matters in Northern Ohio. Also contains quite a Legal Directory.

THE WEEKLY LAW BULLETIN of Cincinnati, O., No. 17 of vol. 3, is received. It contains 20 pages (law book size), closely printed, besides a supplementary list of "motions filed"—and is the exponent of the Sixth U. S. Judicial Circuit,—(Ohio, Michigan, Kentucky and Tennessee.) Contains the "new law as to [official stenographers]" in Ohio; also syllabi of cases, by the Supreme Court Commission of Ohio,—two of which we reprint in this number of the RECORD. Carl G. Jahn, editor; terms \$3. per year.

CHICAGO LEGAL NEWS.—This veteran and mammoth Chicago representative of the Law continues its weekly visits to us, and seems to grow larger with each issue. No. 502, of June 1st, contains 28 pages of its large size—equivalent to over 60 pages of our RECORD—and all for only \$2.00 per year.—But then, 20 of those pages are mostly solid legal advertisements, for which the company must realize an almost princely yearly income—it being the official medium of Legal notices for that great city;—leaving 8 pages for its court decisions. Is published every Saturday. Myra Bradwell editor.

THE TELEPHONE;—Still another effort of Young America, comes to us from La Crosse, Wis. Its motto,—“room enough at the head” has the true ring, and it contains some fine things. We heartily wish it success. Terms only 25 cts. per year.—Frank P. Toms Editor.

“The Alpha Journal.”—Another amateur paper,—the organ of the “Alpha Society”, at Sterling, Ills.—Vol. 1. No. 9.—has found its way to the Reading table of the LEGAL RECORD office. We think there must be “Sterling” worth and enterprise among the boys and girls of that vicinity,—with a tincture of equal rights,—which augur well for the future of the society and the paper.—Terms 75 cts. a year. They have the RECORD’s most cordial salutation and good wishes.

CALIFORNIA LEGAL RECORD.

VOL. I.

JUNE 15, 1878.

No. 12.

Legal Notes.

SUPREME COURT RULE.—The following rule has been added to the rules adopted by the Supreme Court:

Rule 38. When the Judge before whom an action was tried is dead, any unsettled bill of exceptions or statement, on motion for new trial therein, may be settled and certified by his successor in office, or, if he be disqualified, by the Judge of an adjoining district, when the action was tried in a District Court; and by the Judge of an adjoining county, when the action was tried in a County Court.

STATE EXTRADITION.—The United States District Court for New Jersey, in *The Matter of Noyes*, decides that a State which has procured the rendition under the act of Congress of a fugitive from justice who has fled to another State, may put him on trial for an offence other than the one for which he was delivered up, and can try him even though he was surrendered without legal authority. The principle which governs the law of extradition between the States of the Union is in this respect different from that which governs when an alleged fugitive from justice is surrendered by one nation to another. Only a few offenses are considered of sufficient gravity to justify the denial of the privilege of an asylum, which most modern nations give to those fleeing from other countries, and the various extradition treaties particularly define these. But between different parts of the same country there can be no privilege of asylum, and the constitutional provision in reference to the delivering up of fugitives includes every crime, and not a few specified ones, as do the extradition treaties.

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SUPREME COURT CALENDAR FOR JULY TERM.—We are informed by Clerk D. B. Woolf that the Calendar for the July Term of the Supreme Court will be published shortly—and will be quite a long one—240, or more cases. We shall publish it as soon as ready.

AN IMPORTANT WILL CASE.—A will made in favor of Mrs. J. S. Butler, of Oakland, by Maria J. Toomes (widow of Elbert Toomes, a former prominent citizen of Tehama County), has been contested by a new-found female cousin of deceased, living in Santa Barbara County. Judge Nye, of Alameda, has rendered a decision in favor of the legatee. The case will be taken to the Supreme Court. It involves about \$50,000.

A SUIT FOR A MOUSTACHE.—A young gentleman of Peoria, Ill., has brought suit against a tonsorial artist of that municipality for \$500, which amount, in lawful currency, he claims as indemnity for loss and damage sustained by reason of malpractice on the part of defendant, the melancholy result of which was the sacrifice of a portion of an incipient moustache, which the plaintiff had thus far reared with tender care and infinite solicitude. We do not know how the Court and jury will regard this suit, whether they will treat it with gravity or levity; but a little reflection will convince even the most thoughtless man that the injured youth has solid ground of complaint. In all ages of the world the hirsute adornment of the head and face has been regarded with an interest amounting almost to veneration. The ancient Israelites, the Arab tribes of old and recent times, the Chinese and other Orientals all shared or share this feeling. The Scriptures show that the hairs of all heads are numbered. Whether the plaintiff in this case had taken a census of his moustache, and in his bill of particulars, charges at a given price per hair, we are not advised. It is likely, however, that his bill is for the entire moustache, for the remaining section cannot be regarded as of much utility. Fractions, in such cases, are of no account. Victims of the careless handling of razors will watch the progress of this case with interest.

A JUDGE THREATENED—We understand that Judge Dwinnelle of the 15th, District Court, has received an anonymous threatening letter bearing upon his decision in the San Pablo Ranch case. The writer is not yet known.

A SACRAMENTO CASE—Selling the Same Lots Twice.—In a case of the People vs. James Garnett, the Defendant was charged with selling land twice, in violation of law. He had possession of the block bounded by Eighteenth, Nineteenth, J. and K. streets, Sacramento. He gave a quit claim deed to J. S. Barrett for four of the lots, in consideration of which Barrett assigned to him a bond and mortgage. A short time afterward Garnett made arrangement with Babcock, Waterhouse and Muldrow by which he gave them a quit claim deed for a portion of the lots already deeded to Barrett, and received in return a Muldrow deed for his own lots. Neither of these deeds were placed on record, but Barrett became cognizant of their existence, and the facts were presented to the Grand Jury. On the trial it was contended that Garnett had acted on the advice of the attorneys, Babcock and Waterhouse, and therefore could not be held responsible criminally. Coffroth and Dunlap appeared as attorneys for the defendant. The case was argued by District Attorney Goods for the State, and Coffroth for the defense. After a half hour's absence the jury returned into Court with the following verdict: "We, the jury, find the defendant guilty as charged in the indictment, recommending him to the mercy of the Court, and asking the District Attorney to proceed against Babcock, Waterhouse and Muldrow."

COMMISSIONER OF DEEDS.—Governor Irwin has appointed C. S. Charlot as Commissioner of Deeds for California, to reside at St. Louis, Missouri.

NOTARY PUBLIC.—Governor Irwin has commissioned R. E. Arick as Notary Public for Kern county, to reside at Bakersville, vice self, term expired.

COSTLY CORRESPONDENCE.—The Jury in the case of Edgerly against Smith returned a verdict for the plaintiff recently for \$3,000 damages. The cause of action was an alleged libelous statement concerning the plaintiff, who is a resident of Boston. It would be well for letter writers to understand that when they write injurious words about others they are liable to be sued for damages. It is not necessary that a libelous letter should be read by more than one person; the injury is the same in the eye of the law, as if it was published in the columns of a newspaper having a circulation of a million copies. The trouble in this case had its origin in a little family quarrel. Sally Edgerly, daughter of the plaintiff, is a cousin of Mr. Joseph E. Smith, the defendant, and lived in his family for ten years. She left quite suddenly and got married, leaving behind a trunk containing a new sacque, to which article of dress she was devotedly attached. There was some delay in forwarding the trunk to her new house in Jerseyville, and Mrs. Smith claimed the sacque because she had purchased the material of which it was made. The loss of her favorite sacque made Sally very angry, and she wrote a spiteful letter to Mrs. Smith, and told a Mrs. Mitchell something that was not complimentary to Mrs. S. Thereupon Mrs. Smith became indignant, and wrote some letters derogatory to the character of Sally's mother, the plaintiff herein. These and other letters fell into the hands of Mrs. Edgerly, living near Bunker-Hill Monument, and she vowed vengeance upon the whole Smith family. She selected Mr. Wm. F. Smith, attorney, as her counsel, and he instituted four libel suits against the Smiths, based on the letters. The third of these suits was tried yesterday, with the result above named. Col. Slayback defended the Smiths with his usual vim, but his opponent was a foeman worthy of his steel, and the case for the plaintiff was so clearly and forcibly presented that the jury gave a verdict for a pretty round sum, although a much larger amount was claimed. The instructions of the Judge were satisfactory to both sides, and the jury was possessed of more than average intelligence.

Supreme Court of California.

[January Term, 1878.]

[No. 10,315.]

[Filed March 1, 1878.]

EX PARTE FRANK ON HABEAS CORPUS.

MUNICIPAL CORPORATIONS.—Powers of.—A Municipal Corporation is the creature of the Statute invested with such power and capacity only as is conferred by the statute or passed by necessary implication.

SAME—In construing the words of the grant, the whole chapter and the general legislation of the State respecting the matter must be consulted in order to determine whether by the terms "license and regulate" it was intended to authorize licenses for purposes of revenue. Acting on this rule of interpretation it is held that the act giving power "to license and regulate trades, callings and employment as the public good may require to be licensed and regulated" confers power to exact license fees for purposes of revenue.

SAME—But an ordinance passed under a general authority of this nature must be—1, reasonable, consonant with the general powers and purposes of the corporation and not inconsistent with the laws or policy of the State. 2, it must not be oppressive; 3, it must be impartial, fair and general; 4, it may regulate but must not restrain trade or contravene public policy.

SAMPLE SELLER'S ORDINANCE.—Statement of case.—Frank was convicted of a misdemeanor for violation of what is known as the "Sample Seller's Ordinance," and being restrained of his liberty upon process issued upon the judgment of conviction, was before the Court on a writ of habeas corpus. The ordinance provides in effect that any person who shall sell or solicit for the sale or purchase of any goods, wares, merchandise, etc., without at the time having the goods at or in the city and county of San Francisco, or a bill of lading of a common carrier, showing the goods are in transitu to said city and county, shall pay a license of \$2,000 per quarter for every \$250,000 of business done, and then establishes other proportions. But the ordinance provides also for licensing other persons for buying and selling the same character of goods that are within the corporate limits of said city and county, fixing the fees at \$100 per quarter for the same amount of business. *Held* that the ordinance is flagrantly unjust, oppressive, unequal and partial. It contravenes public policy, and obstructs commercial intercourse between the principal seaport city of the State and the interior, and is in restraint of trade, and is, therefore, inoperative and void.

OPINION BY THE COURT.

The petitioner having been convicted of a misdemeanor for the violation of what is known as the "Sample Seller's Ordinance" of the City and County of San Francisco, and being restrained of his liberty upon process issued upon the judgment of conviction is before us on a writ of *habeas corpus*, and claims that he is entitled to be discharged from custody, on the ground that the ordinance is unconstitutional and void.

The ordinance in effect provides that any person who, in the city and county of San Francisco, shall sell, or contract to sell, or cause to be sold, or solicit for the sale, or purchase of any goods, wares, merchandise, distilled liquors, or drugs or medicines, jewelry, or wares of precious metals, or stones, or any other property of any kind, except wheat, wine, wool, brandy, agricultural productions in the raw state, and imports of foreign goods, wares and merchandise upon which duties have been paid or secured to be paid to the United States, and which have never been sold in the United States and are still in original packages, whether on commission or otherwise, without, at the time, having the goods at or in the said city and county or a bill of lading or receipt of a common carrier, showing on its face that the goods named therein have been shipped and are *in transitu* to said city and county "shall pay a license in proportion to the amount of business done by him or them as follows." The ordinance then provides that those doing business to the amount of \$250,000 and over per quarter, shall constitute the first class, and shall pay a license fee of \$2,000 per quarter, and then establishes seven other classes, according to the amount of business done, regulating the license fee to be paid by the amount of business done. Another chapter of the same ordinance provides for licensing persons engaged in the same general business of buying and selling the same kind of merchandise within the corporate limits, and divides them into several classes, according to the amount of business done, but the license fee to be paid in this class of cases is far less than is exacted for a sample-seller's license. For example, the merchant whose goods are within the corporate limits, and who does a business to the amount of \$250,000 per quarter, is required to pay a license fee of \$100 per quarter, while a merchant engaged in the same business, but whose goods are not within the corporate limits, or actually *in transitu* to San Francisco, under a bill of lading, and whose business amounts to \$250,000 per quarter, is required to pay a license fee of \$2000 per quarter—just twenty times more in the latter case than in the former. About the same ratio of inequality pervades all the other classes established by the ordinance. The result is that a merchant whose business it is to sell goods which at the time of the transaction are not actually within the corporate limits or *in transitu* under a bill of lading is required to pay about twenty times more for the privilege of pursuing his avocation than another merchant doing business in the same city and who deals in the same kinds of merchandise, but who buys and sells only goods

which are actually within the corporate limits or *in transitu* under a bill of lading. The discrimination is made to depend solely on the fact that in the one case the goods are either within the corporate limits or *in transitu* under a bill of lading, and in the other case they are not.

It is contended on behalf of the petitioner that the ordinance violates several provisions of the Federal Constitution, and particularly that which confers upon Congress the power to regulate commerce with foreign nations and among the several States. But we do not find it necessary for the purposes of this decision to examine the questions of Constitutional law which have been so ably and elaborately discussed by counsel, and shall rest our judgment on other grounds. "A municipal corporation is the creature of the statute invested with such power and capacity only as is conferred by the statute, or passes by necessary implication from the statutory grant." *Herzog vs. San Francisco* 33 Cal., 143. *Argenti vs. San Francisco*, 16 Cal., 282. *Wallace vs. San Jose*, 29 Cal., 180. *Dillon on Municipal Corporations*, sections 55, et. seq.; *Cooley on Const. Lim.*, 191 to 195.

It becomes material therefore to inquire what powers have been conferred upon the Board of Supervisors of San Francisco in respect to licensing occupations. By the third section of the Act of March 30, 1872 (*Statutes* 1871-2, 736) it is provided that the Board of Supervisors shall have power, by ordinance, "to license and regulate all such callings, trades and employments as the public good may require to be licensed and regulated, and as are not prohibited by law." When the power conferred upon the corporation, as in this case, is to "license and regulate" callings and occupations, a question has sometimes arisen in the courts, whether under such a grant of power, the corporation could exact license fees for purposes of revenue, or should be limited to a sum reasonably sufficient to defray the expense of granting the license. (*Dillon on Mun. Corp.*, § 291.)

But the rule, as stated by Judge Dillon, is that in construing the words of the grant, the whole charter and the general legislation of the State respecting the subject matter, must be consulted in order to determine whether by the terms "license and regulate" it was intended to authorize licenses for purposes of revenue. Acting on this rule of interpretation, we are of opinion, that it was intended to authorize the city and county of San Francisco to exact license fees as a source of revenue. There are, however, certain rules adopted by the

Courts in construing the ordinances of a municipal corporation passed under a general power conferred by statute on the corporation to pass ordinances on a given subject, which it is necessary to consider. An ordinance passed under a general authority of this nature must be first, "reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State;" second, it must not be oppressive; third, it must be impartial, fair and general; fourth, it may regulate, but must not restrain trade. (*Dillon on Mun Corp.*, § 253 to 257 inclusive, and authorities there cited).

By its charter the city of St. Louis was authorized to establish markets, market places and meat shops, provide for the government and regulation thereof, and the amount of license to be paid therefor and to regulate the vending of meat, etc. A city ordinance was passed which prohibited any person, not being the lessee of a butcher's stall, from selling, or offering for sale any fresh meat in quantities less than one quarter. In *St. Louis vs. Weber*, 44 Mo., 547, this ordinance was assailed on the ground that it was an unreasonable exercise by the city council of the authority granted by the charter, and was therefore void. But while upholding the ordinance as not unreasonable, the Court states the rule applicable to this class of cases with clearness and precision: "If this ordinance is unequal, oppressive and unjust; if it be not a legitimate regulation of the vending of meat, but partial and unfair, establishing monopolies or subjecting either the seller or purchaser to unnecessary inconvenience or expense, it certainly should not be upheld. In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will be always exercised with the highest discretion, and when it is plainly granted a clear case should be made to authorize an interference on the ground of unreasonableness." This, we think is the true rule; and it proceeds upon the theory, that under a general grant of power to a municipal corporation to pass ordinances on a given subject it will be presumed that it was not intended to clothe it with power to pass an ordinance which is clearly unreasonable, unjust, oppressive, partial and unfair, or which contravenes public policy, or is in restraint of trade. But an ordinance will not be pronounced invalid by the Courts on either of these grounds, unless in a plain case.

It is, however, for the Court, and not for the jury, to pass upon the validity of the ordinance. (*Dillon on Mun. Corp.*, § 261.)

Tested by these rules, the "Sample-sellers' ordinance," now under review, must be held to be inoperative and void. It is obnoxious to all the objections above enumerated. It is flagrantly unjust, oppressive, unequal and partial. It discriminates between merchants in the same place, dealing in the same kinds of merchandise, for no better reason than that one deals in goods either actually in the corporate limits, or *in transitu* under a bill of lading, while the other deals in goods outside the corporate limits, and not *in transitu*, under a bill of lading. If this kind of discrimination be legitimate and valid there is no reason why a merchant having his goods in a warehouse on a particular street might not be required to pay a license fee of \$10,000, while another merchant doing the same kind of business in the same city, and with his goods stored on another street, would be required to pay only \$10. It also contravenes the public policy of the State, in that it obstructs commercial intercourse between the principal seaport city of the State and the interior; the policy being to foster and encourage commercial intercourse and a free interchange of commodities between the several sections. It is in restraint of trade, in that it exacts a heavy tribute from the owner of goods outside the corporate limits and not *in transitu*, as a condition on which he will be allowed to offer them for sale in the principal city and seaport of the State. But we need not multiply arguments to show the infirmities of this ordinance.

In the case of Mayor, etc., vs. Althrop, 5 *Coldwell*, (Tenn.) R. 554, the Supreme Court of Tennessee, in an able and learned opinion, discuss the validity of an ordinance very similar to that now under review, and hold it to be void on the grounds to which we have adverted.

We are of opinion that the so-called "Sample sellers' Order" is invalid, and that the prisoner is illegally restrained of his liberty.

Ordered that he be discharged from custody.

CROCKETT, J.

We concur: { RHODES, J.
NILES, J.
MCKINSTRY, J.

Supreme Court Unwritten Opinions.

[No. 6,013.—Decided May 1, 1878.]

CITY OF STOCKTON, Plaintiff and Appellant.

vs.

NATIONAL GOLD BANK OF D. O. MILLS & CO.,
Defendant and Respondent.

Appeal from Sixth District Court, Sacramento County.

NATIONAL BANKS not liable for municipal license.

STATEMENT OF THE CASE.

This action was brought by the City of Stockton to compel the Bank of D. O. Mills & Co., to pay a municipal license tax of \$100, per quarter;—and asks judgment for the amount due for five quarters,— \$520,—and a penalty of \$1,212. The Bank admitted having a capital stock of \$300,000, but claimed that it was all invested in United States bonds, and all held by private persons,—and hence exempt from taxation, and claimed incorporation, under the act of Congress of February 25, 1863. Plaintiff claimed that the act was repealed before defendant was incorporated.

Cause tried, without jury, on March 1, 1878, and judgment for defendant, dismissing plaintiff with costs.

From this the plaintiff appealed March 5, 1878. Judgment now affirmed, and remittitur forthwith.

S. Solon Holl, attorney for plaintiff and appellant.

Geo. Cadwalader, attorney for defendant and respondent.

[No. 5874.—Decided April 22, 1878.]

HORACE WILSON, Plaintiff and Respondent.

vs.

SOUTH PACIFIC R. R. CO., Defendant and Appellant.

Appeal from Twentieth District Court, Santa Clara County,
D. BELDEN, Judge.

STORAGE.—LOSS BY FIRE—CHANGE OF VENUE.—

STATEMENT OF THE CASE.

Plaintiff's complaint claims that the defendant had a depot and warehouse at Hollister in San Benito County in which they kept and stored goods and merchandise for hire; and

that he placed sixty-four bales of wool weighing 22,275 pounds with them for storage on October 31, 1876, upon agreement to pay storage, and it to remain until he chose to ship same away.

On January 5, 1876 there were destroyed by fire 20,804 pounds of the wool, and 370 pounds of the remaining 1,471, so damaged as to be worth only three cents per pound.

Wool was worth thirteen cents per pound, and whole loss claimed to be \$2,741.52. Plaintiff claims that the fire and loss was through *negligence* of the defendant,—and that he afterward, before commencement of this action, tendered the full amount of storage, and demanded compensation, and has been refused. Defendant demurred to the complaint, as ambiguous, in not stating whether the claim for compensation was as a common carrier, or as a warehouse-man, and not showing *how* defendant was guilty of *negligence*. Defendant also demanded a change of venue to San Benito County as the proper County for trial, and for convenience of witnesses; which was at first denied, as the affidavit of defendant was insufficient. A second affidavit was filed, upon which the Court did grant a change of venue, on October 6, 1877.

A Bill of exceptions was filed by plaintiff October 10, 1877, and an appeal taken October 22, 1877, from the order granting change of venue. That order now affirmed, Remittitur forthwith.

Moore, Laine & Leib, attorneys for plaintiff and appellant.
S. F. Lieb, of counsel for appellant,

Francis E. Spencer, attorney for defendant; and *J. E. Foulds* attorney for respondent, and *S. W. Sanderson* of counsel.

[No. 5,623.—Decided April 22, 1878.]

JOHN ROSENFELD, Plaintiff and Respondent.

vs.

ALFRED W. REAY, JOSEPH W. REAY, and JOHN BRICKLEY, Defendants and Appellants.

Appeal from the Twelfth District Court. San Francisco,
DAINGERFIELD, Judge.

FORECLOSURE OF MORTGAGE.

STATEMENT OF THE CASE.

On May 5, 1874, A. W. Reay gave to John Rosenfeld a promissory note for \$5,000, payable two years after date, with

interest at 9 per cent. semi-annually, and if not paid when due, to be compounded.

Gave a mortgage on property on the N. W. corner of Haight and Buchanan Streets to secure its payment.

No interest or principal having been paid, this action is brought, and judgment claimed for amount due, and counsel fees (\$350), and a decree for the sale of the premises.

A. W. Reay and Jos. W. Reay not appearing, default was entered against them.

A. W. Reay demurs; also Joseph W. Reay and John Brickley. Both demurrers overruled, July 14, 1876.

John Brickley, in answer, claims that the land mortgaged was owned in fee on December 28, 1869, by J. W. Reay and Edward Roper, and by them conveyed to Louis Schumacher, by a deed, absolute on its face, but really as security for certain indebtedness; and Schumacher conveyed same to present plaintiff, to secure his indebtedness to plaintiff; and plaintiff had full notice and knowledge of the nature of the entire transaction.

But Brickley avers that the said debt was paid before the commencement of this action.

Brickley is a tenant of said Roper, and, as tenant, is entitled to possession of the premises, and that Alfred W. Reay has no title except as from Rosenfeld.

Cause heard January 22d, 1877—after default of A. W. and J. W. Reay.

No one appeared for Brickley on trial. No jury, and judgment for plaintiff for \$5,000, and interest, \$1,343, and costs, aggregating \$6,346.25, on January 22, 1877.

Appeal taken by defendant from the judgment on March 15, 1867. Judgment now affirmed, with 5 per cent damages. Remittitur forthwith.

Warren Olney, attorney for plaintiff and respondent.

J. W. Seawell, attorney for defendants and appellants.

[6009.—Decided May 1, 1878.]

BANK OF SAN LUIS OBISPO, Plaintiff and Respondent,
vs.

CHAS. H. JOHNSON, Defendant and Appellant.

Appeal from First District Court, San Louis Obispo Co.

E. FAWCETT, Judge.

FORECLOSURE OF MORTGAGE.

STATEMENT OF THE CASE.

The defendant, on July 14, 1874, gave his promissory note

to plaintiff, for \$5,000, due two years after date, with interest at 1 per cent. per month, payable monthly, or, if not paid, to be compounded at same rate: This was secured by a mortgage on two parcels of land—one of 280 acres, and one of 160 acres in San Luis Obispo County. In case of default of payment of principal or interest the mortgagee to commence proceedings of foreclosure in the usual manner.

The interest was paid down to November 1, 1875, and no more; hence plaintiff now brings action for foreclosure and sale of the land, October 5, 1876.

Johnson demurred, which was overruled. Defendant failed to appear in time, and default was entered on January 16, 1877; and on January 17, a judgment and decree of foreclosure and sale of the land.

A certified copy of the judgment was then procured from the Clerk of the Court, upon which the Sheriff proceeded to sell the land, which was bid off by C. H. Phillips, for the Bank, for the amount of mortgage and costs (\$6,188.11), on February 17, 1877, and mortgage satisfied.

On September 24, 1877, upon an affidavit of McD. R. Venable, attorney of record for plaintiff, a motion was made to *cancel* the satisfaction of the mortgage, on the ground of a doubt of the validity of the sale, as being held under a certified copy of the judgment and decree only, and the sale be vacated and set aside, and a new sale be granted under the proper writ, etc.;—which was done October 8, 1877. From this order defendant appealed, November 10, 1877,—and from the judgment of January 17th.

Judgment and order now affirmed. Remittitur forthwith.

W. J. and E. Graves, J. M. Wilcoxon, attorneys for defendant and appellant.

McD. R. Venable, attorney of record for plaintiff; and *O. P. Evans*, for same as respondent.

[No. 5465.—Decided April 22, 1878.]

A. E. HEAD *et al.* Plaintiffs and Respondents,

vs.

JNO. C. BELL, Defendant and Appellant.

Appeal from Nineteenth District Court, San Francisco,

E. D. WHEELER, Judge.

RECOVERY OF RENT ON LEASE.—

STATEMENT OF THE CASE.

Plaintiffs, Addison E. Head and Robt. F. Morrow, on April 23, 1866, leased to defendant, for 10 years, certain premises

in San Francisco, at the intersection of Sutter Street with Montgomery and Market Streets, at a monthly rent of \$1,200, to be paid in advance on the first of each month. Failure being made of payment of \$900 of the rent for March, 1876, and \$1,200 for April, 1876, plaintiffs bring this action to recover said amounts, with respective interest.

In answer, defendant claims, in bar and counter claim, that plaintiff closed up an outlet on the roof of the building so leased, in such a way that the rains accumulated on the roof and sagged the same, and leaked through, and spoiled and damaged his upholstery goods, and necessitated repairs to the extent and expense of \$12,958, for which he claims judgment. Motion made by plaintiffs to strike out said answer and cross-complaint, on May 27, 1876, and granted, on September 29, 1876, and judgment for plaintiffs for \$2,100, and interest, amounting to \$2,214.50, and costs, \$121. Defendant appealed October 10, 1876, from the judgment. Judgment affirmed. Remittitur forthwith.

S. Hydenfeldt, Jr., attorney for plaintiff and respondent;
Roche & Robinson, attorneys for defendant and appellant.

[No. 5782.—Decided April 19, 1878.]

WM. B. KOLMAN, Plaintiff and Appellant.

vs.

THOS. HENNESSY, Administrator of the estate of E. W.
Emery deceased, Defendant and Respondent.

Appeal from Fifth District Court, San Joaquin County,—
BOOKER Judge.

ACTION by ASSIGNEE to recover moneys borrowed and entrusted.

STATEMENT OF THE CASE.

E. W. Emery died intestate March 23, 1875. On June 1, 1875, Thomas Hennessy was appointed Administrator of the estate by the Probate Judge of San Joaquin County.

An order made by the Probate Court was published, on June 12, 1875, that creditors present claims within ten months from date of publication.

Plaintiff claims that on March 23, 1875,—and shortly before his death,—Emery borrowed of A. M. and J. H. Kolman \$855, and also received from them \$245 more, to pay to one W. B. Johnson.

The Kolmans became bankrupt, and M. Coleman, their assignee, sold their assets, including this claim, amounting to \$1,102.50, to one Schlamm,—he conveyed the same to E. Schrier, who presented it to Hennessy as Administrator, for payment out of the estate.

He rejected the claim, as did also the Probate Judge, when presented for his approval. On September 8, 1875, Shrier brought suit for the claim against the administrator, and was non-suited. In January, 1876, Shrier conveyed the claim to Wm. B. Kolman, who had full knowledge of all the previous proceedings. He presented the same to the Administrator and Probate Judge for approval, and allowance, which both again rejected.

When Emery died he held three promissory notes, payable to himself or order,—one signed by Kolman & Son, and four other persons for \$700, bearing interest at 2 per cent. per month; the second signed by Kolman & Son, and E. Cannavan Jr., for \$100 with interest at $1\frac{1}{2}$ per cent per month; and the third for \$200, with interest at 2 per cent. per month, signed by Kolman & Son.

On these the defendant as administrator sued for amount of first note, and obtained judgment against two of the obligors, but K. & Son, not being served with process, no judgment was entered as against them. No part of this judgment has been satisfied.

Plaintiff brought this action within three months after his presentation of the claim and its rejection;—which was tried without jury, and judgment rendered against him;—from which he appealed on May 18, 1877.

Judgment now affirmed. Remittitur forthwith.

J. M. Hogan, J. H. Budd, and Terry, McKenne & Terry, attorneys for plaintiff and appellant.

F. T. Baldwin, and Aug. Munter, attorneys for defendant and respondent.

Recent U. S. Land Decisions.

GEORGE FERGUSON, Plaintiff in Error.

vs.

CHARLES McLAUGHLIN.

In error to the Supreme Court of the State of California.

Mr. Justice Miller delivered the opinion of the Court.

The case before us was originally an action to recover possession of land, brought in the proper Court of the State of California.

The plaintiff proved a patent from the United States to the Western Pacific Railroad Company, and a conveyance by said company to him of the land in dispute. In conformity to the practice in the Courts of California, the defendant, Ferguson, filed an answer in the nature of a cross-bill in equity, which alleged that while plaintiff had the apparent legal title, he held it, or should be decreed to hold it for the benefit of the defendant. The ground of this equitable right briefly stated is, that the defendant had made a valid claim to the land under the pre-emption laws before the inception of plaintiff's title, and that although this matter had been contested before the officers of the land department, and they had decided in favor of the Western Pacific Railroad Company, yet that decision was erroneous in law and in fact; and he prayed the Court to decree him that relief which he was in equity entitled to.

The case was submitted to the Court, whose findings of fact are in the record, and whose judgment in favor of the plaintiff in the Court below was affirmed by the Supreme Court of the State.

This writ of error brings before us the question whether, on the facts so found, the defendant below, (the plaintiff here,) is entitled to be declared the equitable owner of the land for which the other party recovered judgment.

There is not the slightest evidence of fraud or of any mistake of fact in the proceedings before the land department. There is very little evidence of what did take place there, and especially of what was proved there.

But there is in the findings of the court a statement that his claim was rejected by the land office on two grounds, namely: 1, that his residence was not on any part of the congressional subdivision to which this land belonged; and, 2, that he had sold part of the land for which he had filed his original pre-emption claim.

The act of Congress of 1853, which provides for the survey, pre-emption, and sale of the public lands in the State of California, and which was before this court last winter in the case of *Sherman vs. Buick*, 93 U. S. Rep. 209, declared that all those lands, with certain exceptions not pertinent to this case, should, whether *surveyed* or *unsurveyed*, be subject to the pre-emption laws of the 4th of September, 1841, with

all the exceptions, conditions, and limitations therein contained. One of the limitations of that act was that the person claiming the right of pre-emption to any part of the public land must have erected a dwelling-house and made an improvement thereon, and that the congressional subdivision for which claim is made must include the claimant's residence. It is true that under that statute no valid settlement could be made until after the land was surveyed, and the party could know just where he was making his residence with reference to the congressional sub-division which he proposed to claim, and in reference to which he might locate his settlement, while under the act of 1853 he could settle before the surveys, and make his claim after they were made and filed in the local office. The officers of the land department have, however, held that, when he comes before them finally to assert his claim, he could not establish a valid claim for any quarter-section, or any part of a quarter-section, unless his dwelling-house, his actual residence was on some part of that quarter-section. In this construction of the act of 1853 we concur, and it is fatal to the case of plaintiff in error. And this question of law is the only one of which this court can have jurisdiction in the present case.

It appears very clearly by the facts found that Ferguson's original claim or settlement of about 150 acres is subdivided by the township line which runs between township six (6) and seven (7) south, of range one (1) west of the Mount Diablo meridian, and that about thirty acres, including his residence, fell within the latter. He afterwards secured a title to this as a settler on land granted to the town of Santa Clara by act of Congress, which act provided that the grant should enure to the benefit of those who were actual settlers on any part of it.

As we have already said, the land office held that this fact was fatal to his right of pre-emption in any portion of township six, though it adjoined his land in the other township and was part of his improvement.

We see no error in that construction of the law and none in the judgment of the Supreme Court of California, which is therefore, affirmed.

NOTICE.

OF THE TRANSFER OF CERTAIN TOWNSHIPS FROM THE SAN FRANCISCO TO THE HUMBOLDT LAND DISTRICT IN CALIFORNIA.

Notice is hereby given that the President of the United

States, by executive order dated March 23, 1878, has pursuant to law directed that Townships 5 South, of Ranges 1, 2, 3, 4, 5, 6, 7, and 8 East, Humboldt meridian; and Townships 25 North, of Ranges 11 and 12 West Mount Diablo meridian, be transferred from the San Francisco Land District to the Humboldt Land District in California.

Further notice of the precise time when the land officers at Humboldt will be in readiness to receive applications for the lands transferred will be given by the officers of the district by publication.

Given under my hand, at the City of Washington, this twenty-seventh day of March, A. D. 1878.

By the President:

J. A. WILLIAMSON,
Commissioner General Land Office.

NOTICE.

OF THE REMOVAL OF THE LAND OFFICE FROM INDEPENDENCE TO BODIE, CALIFORNIA.

Notice is hereby given that the President of the United States, by executive order dated April 16th, 1878, has revoked his order of December 27th, 1877, discontinuing the land-office at Independence, California, and transferring its records to the office at Visalia, and directs that the office be removed from Independence to Bodie as soon as practicable.

The register and receiver of the district will give further notice by publication of the date when the office will be closed at Independence preparatory to removal and re-opening at Bodie.

Given under my hand at the City of Washington, this 18th day of April, A. D. 1878.

By the President:

J. A. WILLIAMSON,
Commissioner General Land Office

JUDICIAL DECISIONS UNDER THE HOMESTEAD LAW.

"The title will pass not merely in consequence of the enforcement of the payment of a debt by the ordinary process of the courts, but in consequence of the voluntary contract of the party in executing the mortgage.

"The mortgagor of the fee is stopped from denying the existence of the lien which he has attempted to create, and from defeating by his own act the enforcement of the lien against the property thus mortgaged. * * * *

"We think the plaintiff was entitled to the ordinary judgment for a sale of the mortgaged property without any exception of rights subsequently acquired by the mortgagor under the Homestead Act of 1862. * * * *Kirkaldie vs. Larabee* 31 Cal. 456."

SYLLABI OF THE
Supreme Court Commission of Ohio.

(May 29, 1878.)

[Surety, Partnership Liability.]

THOMAS McKEE vs. LEVI HAMILTON Et AL.

JOHNSON, Ch., J.:

Where H., as managing partner of a firm, in order to procure a loan from a third party, brought to plaintiff a note payable to such third party, and signed by himself individually, and to induce them to become sureties of the firm for such loan, represented that the proposed loan was on partnership account and for its use, and that his partner would also sign said note individually, which he subsequently did, that being the usual mode of their executing partnership obligations, and upon the faith of such representation the plaintiffs became liable as sureties by signing said note on the credit of the partnership, and the money is borrowed, received and used in its business—Held:

1. That this created a partnership liability, and plaintiffs became sureties of such partnership.

2. The declaration of H made in procuring such loan, to induce parties to become sureties for the partnership, or to become sureties to a renewal thereof at maturity, during the existence of the partnership, if acted on in good faith, are binding upon the partners.

3. The contract between the principal and his surety, although it may be expressed or be implied from the terms of the contract with the creditor, is not necessarily contained therein, nor evidenced thereby, but may be and usually is a collateral contract, express or implied, which may be shown to exist by any competent and satisfactory evidence.

4. Where the partnership liability for a debt is once fixed, the giving, of a note in renewal by one partner alone, with the same sureties as on the original

debt, who sign[such renewal as sureties on the faith of representations, that it is necessary in the business of the firm and on the promise by him that his co-partner will also sign as a principal; does not as against such sureties operate as a payment of the original debt, and upon payment of such renewal note, by the sureties they may recover against the partners, although such co-partner did not sign such renewal note.

Judgment affirmed.

SYLLABUS IN THE "MATTER OF JACKSON"

In the United States Supreme Court.

[Power of Congress over the Mails.]

1. The power vested in Congress to establish "post-offices and post-roads," embraces the regulation of the entire postal system of the country. Under it Congress may designate what shall be carried in the mail, and what shall be excluded.

2. In the enforcement of regulations excluding matter from the mail, a distinction is to be made between different kinds of mail matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.

3. Letters and sealed packages subject to letter postage in the mail can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

4. Regulations against the transportation in the mail of printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation in any other way cannot be forbidden by Congress.

5. Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages; and with respect to objectionable printed matter, open to examination, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed and shows unmistakably that it is prohibited as in the case of an obscene picture or print.

6. When a party is convicted of an offense, and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine is paid.

CALIFORNIA LEGAL RECORD.

Vol. I.

JUNE 22, & 29, 1878.

No. 13, & 14.

Legal Notes.

DOUBLE NUMBER.—OMITTED DECISIONS.—In this issue (a double number,) we report—as heretofore promised—the 12 decisions of our Supreme Court, omitted from the “San Francisco Law Journal” vol 1. through neglect of *its* Editor; which, with the case of “Ex Parte Frank,” reported in our last issue, completes our continuance from that volume,—with the exception of a few more of the “Unwritten Opinions” which we shall try to crowd in to our next issue.

STOCKTON, June 24, 1878.

MESSRS. SCOFIELD & DRAKE,

Gentlemen,—I see you notice in No. 12 of your LEGAL RECORD the conviction of Garnett for selling the same lots twice.

I send you enclosed an item upon the final disposition of the case, which may be interesting to some of your readers.

Yours truly,

S. L. TERRY.

THE GARNETT CASE.—In No. 12 of the CALIFORNIA LEGAL RECORD mention was made of the trial and conviction of James Garnett for selling land twice. The case was appealed to the Supreme Court, and decided at its July Term, 1868. The appellate Court held that, to constitute the offence of which the defendant was found guilty, an intent to defraud some person was necessary; that Barrett could not have been defrauded because his deed was on record before the conveyance to Babcock, Muldrow, and Waterhouse was executed, and that the last named parties could not have been defrauded as they were informed by the defendant, before he sold to them, of the previous conveyance to Barrett. The judgment of the lower court was, therefore, reversed. The case is reported in the 35 volume of *California Reports*, page 470.

HASTINGS LAW DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA—All persons who desire to be entered as students of the College, will please address the Dean at once at his office, Court Block, San Francisco. For further information, see the address of the founder. S. C. HASTINGS, Dean.

C. F. D. HASTINGS, Registrar. Office, Court Block, 636 Clay St. San Francisco.

IS A SERVANT GIRL ENTITLED TO A "CHARACTER?"—Is a servant girl entitled to a "character" from her mistress? The Queen's Bench Division of the High Court of Justice in Ireland has decided the question in the negative in an action recently brought against a clergyman's wife for "not sustaining a written character." The "help" gave her mistress a month's notice, and was told she could go at once if she liked. She went away then and there, but returned the next day to ask for a written character. Her former mistress complied with her request, stating that the girl had conducted herself soberly, quietly and honestly for a space of six months and was discharged at her own request. She subsequently applied for another situation, producing the written character. The lady stated she would prefer an interview with her former mistress. The plaintiff then went to the latter, who said: "As I can only speak the truth, you had better rest satisfied with your written testimonial." The two ladies met, and the plaintiff received a letter to the effect that her character was not satisfactory. The court has decided that the servant may under certain circumstances claim a discharge, but they have no legal right to a character.

THE SECRETARY OF STATE has received from the binder the first 500 volumes of statutes of the last Legislature. He will forward them to those entitled to receive them as soon as possible.

SALARIES OF CITY OFFICERS.—In a test case before the Superior Court at Baltimore, Judge Dobbin decided that the salary of a city official, while in a city's keeping, cannot be attached by a creditor of the officer, nor be diverted from him by any similar legal process.

A SINGULAR QUESTION IN AN ENGLISH COURT.—High Court of Justice, May 31st—Chancery Division—Before Vice Chancellor Sir Richard Malins—In Re Holden's Trust.—This case arose in circumstances of a peculiar nature. A gentleman named Holden who was Captain of the *Great Queensland*, a merchant vessel of 1,800 tons register, made his will before leaving England in favor of his wife and children. He sailed for Melbourne in August, 1876, taking with him his wife and only child, a girl four years old, and having on board a crew of 32 men and also 30 passengers. Part of the cargo of the vessel consisted of 30 tons of gunpowder, and two tons of wood powder, otherwise called patent safety blasting powder. The vessel was passed on the 12th of August, but she was never after heard of, and an inquiry having been instituted concerning the explosive nature of the cargo, the conclusion came to was that the vessel was blown up by the wood powder igniting and communicating with the gunpowder. A question was now raised as to who was entitled to the property left by Captain Holden, and a petition was presented by his two sisters, who were his next of kin, for payment of the money to them, on the ground that it was impossible to ascertain which of the two—the wife or daughter—had died first. If the wife had survived the daughter, her representatives would have been entitled, but not so if she died before her daughter. Mr. Batten appeared for one of the next of kin of the testator; Mr. Birrell for the other next of kin; Mr. Heath for the owner of the vessel.

The Vice-Chancellor said the report as to the loss of the ship was quite conclusive to his mind that the vessel had been blown up by the ignition of wood powder, and in such circumstances it would be impossible to prove which of the legatees under the will had died first, and therefore, the next of kin of the testator, who were his two sisters, were entitled equally to the property, and an order to that effect would be made.

D. B. WOOLF, CLERK OF THE SUPREME COURT, paid into the State Treasury the sum of \$349 50, fees of his office for May.

Supreme Court of California.

[The following 12 cases were omitted from the San Francisco Law Journal, Vol. 1.]

[July Term, 1877.]

[No. 5376.]

[Filed September 29, 1877.]

KELLER vs. TANSEY

Appeal from Seventeenth District Court, Los Angeles Co.

REHEARING DENIED.—*Held*, that mistakes of a technical or unimportant character, are not sufficient grounds for a rehearing; yet, a denial is not to be construed as controlling the final action of the Court below in this case.

OPINION BY THE COURT.

The petition for a rehearing, points out certain mistakes of fact appearing in the opinion delivered in this case, such as designating the appeal as "an appeal from an order denying a preliminary injunction," instead of "an appeal from an order dissolving a preliminary injunction," etc.

But these, being wholly unimportant in their character, ought not to operate a change in the judgment rendered here.

It is proper to add, however, that the action of this court upon this appeal is not to be considered as directing or controlling the decision of the court below on the final hearing of the cause.

Rehearing denied.

Brunson, Eastman & Graves, attorneys for plaintiff and appellant.

Widney, Glassell, Chapman & Smiths, attorneys for defendant and respondent

[October Term, 1877.]

[No. 5125.]

[Filed October 16, 1877.]

GREENE vs. WHIPPLE.

Appeal from Twelfth District Court, San Francisco.—

EJECTMENT.—ADVERSE POSSESSION.—

STATEMENT OF FACTS.

Annie E. Greene, plaintiff, brought action on August 4, 1875, against Stephen B. Whipple, defendant, for ejectment—from a lot of 50x100 feet, on the corner of Mission and Eleventh streets;—claiming damages of \$500, and restitution.

Defendant claims adverse possession and occupancy as a home, with fencing, and cultivation, for more than five years, and that plaintiff is debarred by secs. 324 and 325 of C. C. P.

Trial by jury, and verdict for plaintiff, for restitution, and costs \$200.60, no November 17, 1875. The claim of plaintiff was that her husband, being the real owner of the land, had in 1862,—13 years before this suit,—made a contract for sale of 25 feet by 100, to defendant for \$1000, to be paid in carpenter work, and about one half had been so paid, since which defendant had refused to pay more, but claimed ownership by undisturbed possession, etc.

But the actual possession by defendant of more than 25 feet not proved.

On December 16, 1875, defendant moved for a new trial on statement of the case, and motion was granted by Judge Daingerfield.

From this order, granting a new trial, plaintiff appealed March 30, 1876.

McAllister & Bergin, attorney for plaintiff and appellant.

D. T. Sullivan, & Barnes, attorneys for defendant and respondent.

OPINION BY THE COURT.

Taking the whole testimony, or the testimony on the part of the defendant alone, there is no evidence tending to prove that the defendant held possession of the demanded premises adversely to the plaintiff.

In this view of the case it is not necessary to inquire whether the instructions of the Court did or did not declare the law. Order reversed.

Note.—A rehearing has since been asked by respondent.—Editor.

[No. 5502.]

[Filed October 18, 1877.]

ROOT vs. QUINTANA.

Appeal from First District Court, San Luis Obispo County;

E. FAWCETT, Judge.

CONTRACT—INCOMPETENT PROOF.—In an action to recover from defendant, for building materials furnished;—*Held*, that it was not competent for defendant to prove in answer "that the buildings were not finished by the contractor according to the contract," etc.

STATEMENT OF FACTS.

As shown by the amended complaint, the "California Bridge and Building Co."—a corporation—contracted with E. Quintana, on May 1st, 1875, to build a certain building in San Luis Obispo, and between July 15 and August 6, 1875, the firm of Root, Neilson, & Co., sold certain building materials (iron castings), to the Bridge Company as agents of Quintana, to the amount of \$501.50;—for which this suit is now brought. Plaintiffs filed their lien on December 13, 1875, before 30 days after the completion of the building, at which time there was due the Bridge Co. from Quintana over \$2,000.

A. W. Burrell, president of the company, was served with a summons, but was in default. Jas. McGuire has some claim or interest.

Tried September 12, 1876,—at which it appeared that the contract price for the building was \$19,780. It was completed November 16, 1878, and accepted by Quintana November 20th, but he claimed \$3,518 damages for non-fulfilment of contract, and that when he paid all the contract price except the \$2,000, he did so in good faith, and had no knowledge of the indebtedness of the Bridge Company to the plaintiffs:—which the Court ruled out from the testimony.—Judgment for plaintiffs for a foreclosure and sale, on September 13, 1876—with attorneys fees \$100 and costs. Defendants appealed November 28, 1876, on a Bill of Exceptions.

Harrison & McMurtry, attorneys for plaintiff and respondent.

Graves, Wilcox & Graves, attorneys for defendant and appellant E. Quintana.

OPINION BY THE COURT.

This case is not distinguishable from that of McGuire vs. Quintana, just decided, and on the authority of that case judgment affirmed.

Remittitur forthwith.

[No. 5501.]

[Filed October 18, 1877.]

MCGUIRE vs. QUINTANA.

OPINION BY THE COURT.

The answer of the defendant was a general denial—nothing more. It was not competent for him to prove, under an answer of that character, “that the buildings were not finished by the contractor according to the contract,” etc. (*Blithen vs. Blake*, 44 *Cal. R.*, 117.)

Judgment affirmed. Remittitur forthwith.

[No. 5475.]

Filed November 3d, 1877.

THE PEOPLE OF THE CITY AND COUNTY OF SAN FRANCISCO

vs.

QUACKENBUSH.

Appeal from Twelfth District Court, San Francisco.

FINDINGS.—ASSESSMENT FOR CONSTRUCTION OF SIDEWALKS.—*Held*, that the “diagram,” as set forth in the findings, and sent up with the Record, is the only portion that can be considered on the appeal.

OPINION BY THE COURT.

The appeal is from the judgment, and the only question necessary to be considered is, whether the findings support the judgment. It is found by the court below that the assessment, upon which the proceedings are founded, contained no description of the property sought to be charged, except such as was contained in the "diagram"—a copy of which is in the findings. The resolution of intention was for the construction of sidewalks from Turk street to Grove street. Now, the diagram as set forth in the findings, does not show the locality of these streets, or either of them, nor does it contain any other reference by which the location or description of the premises could be seen. It is possible that the diagram set forth in the findings is not the entire diagram as prepared in the Superintendent's office, but, if this be so, the only portion we can consider is that sent up with the record.

Judgment reversed and cause remanded, with directions to render judgment for the defendant on the findings. Remittitur forthwith.

E. F. Preston, attorney for plaintiff and respondent.

Priagle & Hayne, attorney for defendant and appellant.

[No. 4014.]

[Filed November 6, 1877.]

UNGER vs. ROPER.

Appeal from Twelfth District Court, San Francisco.

ADVERSE POSSESSION—ADMISSIBLE TESTIMONY.

OPINION BY THE COURT.

There certainly was evidence tending to show that defendant was in the adverse possession continuously of the premises in controversy, for more than five years from May, 1862. The judgment roll in the forcible entry case was admissible; as tending to show that such adverse possession continued at least until July, 1867. There was no error in refusing to give the instruction asked for by plaintiff.

Appeal from judgment dismissed and order denying new trial affirmed.

Remittitur forthwith.

Barstow, Stetson & Houghton, attorneys for plaintiff and appellant.

E. A. Lawrence, attorneys for defendant and respondent.

[No. 10291.]

[Filed November 16, 1877.]

PEOPLE vs. BEVANS.

LARCENY.—In a criminal cause the prosecution must prove the *locus delicti* as laid in the indictment. The plea of "not guilty" puts in issue all the material averments of the indictment.

OPINION BY THE COURT.

The indictment charged the defendant with the larceny of a cow in Monterey county, and the plea was not guilty. The defendant moved for a new trial, on the ground that there was no evidence tending to prove that the crime was committed in that county.

The plea of not guilty puts in issue all the material averments of the indictment, including that of the *locus delicti*. (People vs. Parks, 44 Cal., 105. People vs. Manning, 48 Cal., 335.) After a careful examination of the evidence given at the trial, we find none which tends to prove in the slightest degree that the crime was committed in Monterey county.

In the trial of a criminal cause, it is so well understood in practice that it is incumbent on the prosecution to prove the *locus delicti* as laid in the indictment, that we can but express our surprise that through inadvertence or otherwise, this plain requirement of the law is so often neglected by the District Attorney, thereby retarding the administration of justice and imposing upon the county the expense of another trial and upon the courts a great additional labor.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 5703.]

[Filed November 27, 1877.]

SEPULVEDA vs. JOHNSTON.

Appeal from. Seventeenth District Court, Los Angeles Co.—

W. T. MCNEALY, Acting Judge.

JUDGMENT IN EXCESS.—

STATEMENT OF FACTS.

Jesus D. Sepulveda, the plaintiff, complains that, on November 1, 1872, the defendant, Geo. A. Johnson, received from her to "hold and invest for use and benefit of defendant"—\$6,139.50; and on December 7, 1872, rendered an account which showed a balance due of principal \$6,139.50, and interest \$1,738.30—total \$7,877.80. Defendant demurred, which was overruled, then answer-

ed that a full settlement was made December 1, 1875, showing a balance due plaintiff of only \$3,300,—of which defendant paid \$300, by draft on Farmers & Merchant's Bank, Los Angeles, and gave two notes of \$1,500 each, the only debt he owes plaintiff, and now offers to pay them.

Trial June 5, 1877,—at which defendant and witnesses were absent. Found that defendant had at a former trial paid \$3000, and let the cause be continued for the balance in dispute. Find now due a balance of \$4,200; and judgment given for that amount and that the two said notes be delivered up to defendant.

Defendant moved for new trial, on a bill of exceptions, claiming that he was informed that the trial was set for June 7th, and so believed and knew not to the contrary, till the evening of the 5th he learned by telegraph of the judgment. It was a mistake, and he has a good cause, etc., with affidavits of A. Johnson and J. G. Eastman. New trial denied, and appeal taken by defendant from the judgment and order on June 20, 1877.

V. E. & F. H. Howard, attorneys for plaintiff and respondent.

Brunson, Eastman, & Graves, attorneys for defendant and appellant.

OPINION BY THE COURT.

It is evident from the admissions in the pleadings and the findings made by the Court, that the plaintiff had judgment for too much money; but the record as presented, does not enable us to determine the amount of the excess here. A new trial is, therefore, necessary.

Judgment reversed and cause remanded for a new trial.

[No. 5690.]

[Filed November 28, 1877.]

WILKINSON vs. MERRILL.

Appeal from Seventeenth District Court, Los Angeles Co

STATE LAND PURCHASE.—The decision of the Land Department upon questions of law and fact pertaining to purchase of State Lands, is conclusive as against the United States, and the plaintiff in this case.

OPINION BY THE COURT.

Under the Act of Congress of July 23, 1866, it was a question for the Land Department, first, whether the State had selected the land in controversy in part satisfaction of any grant made to the State by an Act of Congress; second, whether the State had disposed of the land to a purchaser in good faith under her laws; third, whether the land was within any of the exceptions by which lands are reserved from the validating effect of the Act; fourth, whether the defendant had proved up his claim before the Register and Receiver in

the manner and within the time required by the validating Act. These were questions in which no one but the United States and the defendant were interested; and the Act of Congress confers upon the Land Department the jurisdiction to determine them. On deciding these questions in favor of the applicant claiming as a purchase from the State, it is made the duty of the Commissioner of the General Land Office to certify the lands over to the State for the benefit of the purchaser. The case shows that the selection by the State for the use of the defendant was approved by the Commissioner of the General Land Office and by the Secretary of the Interior, after proper investigation, and thereupon the land was duly listed to the State. Up to this point the rights of no third person had intervened, and the Land Department, to whom the decisions of all the questions of law and fact pertaining to the proceeding were specially confided, having decided in favor of their regularity and validity, the decision was conclusive as against the United States and is conclusive against the plaintiff, who subsequently attempted to acquire the title from the State.

Judgment and order reversed, and cause remanded for a new trial.

Hartman & Haley, attorneys for plaintiff and respondent.

Henry Hancock, attorney for defendant and appellant.

[No. 5591.]

[Filed January 3, 1878.]

BAKER vs. CARRILLO.

Appeal from Seventeenth District Court, Los Angeles Co.

REHEARING.—Inadvertent delay in filing a petition.

OPINION BY THE COURT.

An application has been made to us to recall the remittitur issued in this case, on the ground that a petition for a rehearing was prepared and forwarded within the proper time, but through the inadvertence or excusable neglect of the person to whom it was transmitted to be filed with the clerk, it was not, in fact, filed within the proper time nor until after the remittitur was issued. Accompanying the affidavit in support of the application, we have been furnished with copies of the petition for a rehearing, which it is proposed to file, in case the remittitur be recalled. We have examined and considered the petition for a rehearing and find nothing in it to shake our

confidence in the correctness of our former ruling. It is unnecessary for us to determine whether there is a sufficient showing to justify us in recalling the remittitur, inasmuch as it would be a vain act to recall it when the proceeding would only result in an adherence to our former ruling on the merits of the appeal.

Application denied.

Brunson, Eastman & Graves, attorneys for plaintiff and respondent.

A. W. Hutton and J. F. Godfrey, attorneys for defendant and appellant.

[No. 5637.]

[Filed January 8, 1878.]

BOGGS vs. MULLEN.

Appeal from the Seventh District Court, Lake County.—

WM. C. WALLACE, Judge.

STATE LIEU LAND.—APPLICATION TO PURCHASE.—

STATEMENT OF FACTS.

On December 14, 1874, Henry C. Boggs, plaintiff, made application, under Sec. 3503 of Title 8, Pol. Code, to purchase from the State certain Lieu School Lands in Lake County, of which he had possession and occupancy at the time, and built a steam saw mill and dwelling, barn, stables, etc.,—and so held over four years, with no other occupancy or improvement upon it.

The defendant had previously—on October 24, 1871—made affidavit, and application for same land—(with other land) under act of March 28, 1868—but he omitted to state as to adverse occupancy and improvements; and was never in possession, nor made any improvements. On December 17, 1874, Boggs filed a protest against any title being given to Mullen. On January 31, 1876, contest arose, and defendant demanded a trial in Court, and the Surveyor General referred it to the District Court. Action was brought under sections 3414 and 3415, Pol. Code, relating to State Lieu lands for 16th and 36th sections. Defendant demurred, which was overruled April 26, 1876, and the case submitted upon the pleadings, and an agreed statement of facts.

An amendment of April, 1870, had repealed sec. 53, and re-enacted another, of the act under which defendant had made application,—and that amendment made nonsense in its reading.

Judgment on March 10, 1877—that plaintiff is entitled to purchase the land,—and costs \$27.85.

From this the defendant appealed.

Woods Crawford, and *Thos. P. Stoney*, attorneys for plaintiff and respondent.

John Mullen, and *A. P. McCarty*, attorneys for defendant; *John T. Harrington*, as attorney, and *George A. Nourse* as counsel for the appellant.

OPINION BY THE COURT.

The appeal is from the judgment alone. There is no bill of exceptions or statement. The judgment roll discloses no error.

Judgment affirmed.

[No. 5656.]

[Filed January 10, 1878.]

ELLIOTT VS. LEOPARD MINING CO.

Appeal from Third District Court, San Francisco.

CONTRACT.—COMPROMISE—*Held*, that a contract for a quarter interest in a mining claim, upon establishing its title, stands on the same footing as a quarter share of its proceeds in case of a compromise; and upon a par of such proceeds being paid to a third party, he becomes liable for his portion thereof.

OPINION BY THE COURT.

As stated in the complaint, the contract between Bryan, Aude, & Elliott of the one part, and Fisk, Hendy, & O'Malley of the other part, was in effect that if the title of the latter to the mining claim should be established by means of the legal proceedings proposed to be instituted, the said Fisk, Hendy, & O'Malley would convey to Bryan, Aude, & Elliott "an undivided interest in said mining claims, equal to one-fourth of each thereof;" but "in case the said title to said mining claims should be settled by compromise, the said firm should be entitled to the one-fourth part of the proceeds thereof, or of what might be obtained or realized therefrom." It is averred that Hearst purchased with actual notice of the contract, and that the Leopard Mining Company also had notice of it before and at the time of the compromise. It is contended for the defendants that the contract, as thus stated, created no specific interest in Bryan, Aude, & Elliott in the proceeds of the compromise as such; and that in legal effect it amounted only to a personal covenant by Fisk, Hendy, & O'Malley to account to Bryan, Aude, & Elliott for one-fourth of the proceeds of the compromise after they should have been received. Hence it is argued that the only remedy of the plaintiff is by a personal action against Fisk, Hendy, & O'Malley for a breach of the covenant. But we think this construction of the contract, as it is stated in the complaint, is too narrow. As we construe it, it was intended in case of a compromise, that the interest

of Bryan, Aude, & Elliott in the proceeds should stand precisely on the same footing as their interest in the mining claims would have occupied had the title been established in the courts. In other words, as soon as the compromise was effected, Bryan, Aude, & Elliott became entitled to a direct, immediate and specific interest of one-fourth of the proceeds in specie, and were entitled to demand the same directly from the Leopard Mining Company, and a portion of the proceeds having been paid to Hearst, he became liable to account to the plaintiff for his proportion thereof. Nor is there any misjoinder of causes of action, or non-joinder or misjoinder of parties plaintiff or defendant, nor do we discover anything ambiguous, uncertain or unintelligible in the complaint.

Judgment reversed and cause remanded, with an order to the Court below to overrule the demurrer to the complaint. Remittitur forthwith.

L. Aldrich, and J. B. Mhoon, attorneys for plaintiff and appellants.

Stewart & Greathouse, and Garber & Thornton, attorneys for defendant and respondent.

[No. 5494.]

[Filed February 8, 1878.]

GLASSCOCK vs. ASHMAN.

Appeal from Thirteenth District Court, Tulare County.

REVERSAL OF DECISION.—REHEARING DENIED.—

OPINION BY THE COURT.

On a cross appeal in this case by the plaintiff, we decided, at the last term, after full argument that the Court had failed to find upon material issues, raised by the pleadings, and reversed the judgment, and remanded the cause with directions to find upon the omitted issues, and thereupon to enter judgment upon the findings. That judgment has now become final, and it is proper to render the same judgment on this appeal.

It is therefore ordered that the petition for rehearing be denied, that the opinion and judgment of this Court heretofore rendered be set aside, and it is further ordered that the judgment of the Court below be reversed and the cause remanded with the same directions as on the plaintiff's appeal.

W. W. Cross, attorney for plaintiff and appellant.

Brown & Daggett, and Sayle & McEvaney, attorneys for defendant and respondent.

Supreme Court Unwritten Opinions.

[April Term 1878.]

[3794.—Decided April 19, 1878.]

WILLIAM R. WIGGINS, Plaintiff and Appellant.

vs.

THOS. L. McFARLANE and WM. RASBERRY,

Defendants and Respondents.

Appeal from Eighteenth District Court, San Bernardino Co.
W. T. McNEALY, Judge.

EJECTMENT.—DAMAGES.—LOCATION OF MINING CLAIM.—Plaintiff sues to recover possession of a certain mining claim and damages for the extraction of ores and injury thereto.

STATEMENT OF THE CASE.

The Clark Mining District was organized in San Bernardino County on July 19th, 1869, at a miner's meeting held that day, and laws governing the district were duly made and adopted. On January 6, 1870, amendments to the Rules, etc., were made as follows: " * * * owing to difficulties experienced by miners of this district in procuring a sufficient supply of miners' tools, etc., etc., caused by the great distance to any point where such necessities may be had, that no claims in this District will be subject to re-location for the next six months from the date of this meeting."

On February 18, 1872, one J. S. Alley for himself and McFarlane, discovered and located the claim in dispute and marked out boundaries and posted a proper written notice of their location and claim. Alley and McFarlane immediately went into possession, performed about \$300 worth of work and continued so to work annually up to the time of entry of plaintiff, the work performed consisted of a tunnel and shafts. On December 13, 1875, plaintiff and one A. S. Sutliff, without consent of defendants, entered into possession of said claim near the mouth of the tunnel therein, made a stone monument and thereon placed notice of location.—Plaintiff made no

other monuments or marked any boundaries whatever. Plaintiff was in possession from December 13, 1875, until September 25, 1876, when defendant re-entered and took possession and has held it ever since.

Jndgment for defendants and plaintiff taxed for costs of suit. Motion for new trial filed May 8, 1877.

Plaintiff alleged insufficiency of evidence, errors of law excepted to by plaintiff during trial, and newly discovered evidence. Motion was denied August 3, 1877. Appeal was taken from said order and judgment August 13, 1877.

Judgment and order affirmed.

Curtis & Otis and *C. W. C. Rowell*, attorneys for plaintiff and appellant.

Waters & Swing, attorneys for defendants and respondents.

[No. 5840.—Decided April 10, 1878.]

HENRY C, WILSON, Plaintiff and Respondent.

vs.

JNO. F. PLAYER and I. R. LANDSALE, Deft. and App'l.

Appeal from Second District Court, Tehama County,—

W. T. SEXTON, Judge.

STATEMENT OF THE CASE.

This was an action brought April 7, 1877, to recover for 30 certain valuable sheep, which plaintiff charges that defendant drove away on September 25, 1875, and scattered, and lost, and damaged, and sheared; and claims an aggregate damage of \$3,500. On motion of plaintiff's attorney, the defendant Landsdale was dismissed from the action. Jury waived, and Court found that eight sheep and the buck were not recovered, and worth \$1,000;—that twenty others were sheared while gone, and the wool worth \$61.20; and a damage of \$100 by their running with other poor sheep, with disease, etc.

Defendant moved a non-suit, which was overruled. Judgment for plaintiff, for \$1,161.30, and costs, on April 12, 1877.

Motion by defendant for a new trial, and denied July 19th; and appeal taken August 15, 1877. Judgment and order now affirmed.

J. Chadbourne, attorney for plaintiff and respondent.

Chas. B. Braynard, attorney for defendant and appellant
Player.

[No. 6085.—Decided April 25, 1878]

JACOB ROTHENBUSH, Plaintiff and Appellant,

vs.

SARAH ROTHENBUSH, Defendant and Respondent.

Appeal from Fifth District Court, San Joaquin Co.

———, Judge.

STATEMENT OF THE CASE.

The complaint, filed November 21, 1877, states that plaintiff and defendant were married June 18, 1862, in Sonora, Tuolumne Co., at the dwelling of plaintiff, and that he owned the house, etc., and money—in all about \$900; that defendant had only \$30 in all; and that plaintiff was a Protestant, while defendant was a Catholic. They lived there together till the fall of 1866, and moved to Stockton, where they now reside. Plaintiff being a laboring man, a butcher, has made, between 1866 and 1876, about \$1,300.

In March, 1875, defendant commenced bad conduct—abuse and extreme cruelty to plaintiff in many ways, as recited—and has continued same for two years; and plaintiff now asks for a divorce, and a decree of division of the property, in an equitable manner. Defendant demurs, December 5, 1877, and is sustained, with 10 days for plaintiff to amend,—which he declines to do, and the action is ordered dismissed, and judgment for costs against plaintiff, entered March 8, 1878.

From this, plaintiff appeals on March 9, 1878. "Argued by Montgomery for appellant. No appearance for respondent, and judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer to the complaint. Remittitur forthwith."

W. S. Montgomery, *W. L. Hopkins*, and *J. A. Louttit*, attorneys for plaintiff and appellant.

Terry, McKinne, & Terry, attorneys for defendant and respondent.

[No. 5479.—Decided April 22, 1878.]

A. C. HENDLEY, Plaintiff and Respondent,

vs.

R. H. PETCH ET AL, Defendant and Appellants.

Appeal from Fifteenth District Court, San Francisco.—

DWINELLE, Judge.

ACTION TO QUIET TITLE—PROBATE PROCEEDINGS.—

STATEMENT OF THE CASE.

Plaintiff brings suit under sec. 738 of the Code to quiet title, and states that Richard Petch died testate in San Francisco in 1851, leaving the land in contest equally devised to five children. Petch's will was duly proved and admitted to probate and D. Long named as such in the will, was appointed and qualified as executor. The defendant Selena Medbury, was a devisee, and also wife of Long, at and during the time of the probate proceedings. Defendant, R. H. Petch was also a devisee, and was at the time of his father's decease a minor. Long was appointed his guardian. Mary A. Petch, plaintiff's grantor was a devisee of Richard Petch.

On July 28, 1853, Long filed his final account, etc., and petition that it be settled and allowed, and the estate then in his hands, be divided—the heirs each to receive their respective shares. The same was allowed June 5, 1854. On June 12th, 1854, Long together with the five children and devisees who joined with him, filed their petition praying for partition and distribution of the estate, and that commissioners be appointed. On the filing of said petition the Probate Court made order appointing three commissioners to make partition and distribution. The commissioners made their report June 19, 1854, which was confirmed by the Court. By this distribution the premises in contest were set apart and allotted in severalty to Mary A. Petch. She conveyed the same on March 29, 1854 to the plaintiff. Plaintiff then entered into and has been in possession ever since. No claim was made on him until about six months prior to the trial of this cause.

Plaintiff claims that he entered in good faith and has ac-

quired title in fee simple by five years' adverse possession.

Defendants claim two fifths of the lot in controversy and say that plaintiff is a tenant in common, alleging that the Probate Court had not jurisdiction to divest the other heirs of four-fifths of the legal title to the lot and vest it in Mary Petch, also that the Probate Court did not make a decree of distribution—issue a warrant to the commissioners authorizing them to act—and that no notice that partition was applied for or was about to be ordered was given, as required.

Cause was tried without jury, and judgment was given for plaintiff, as prayed for and for his costs and disbursements.

Motion for new trial was made and denied. Appeal taken October 9, 1876. Judgment and order affirmed.

M. A. Wheaton, attorney for appellants.

Carr & Titus, attorneys for respondents.

[No. 6004.—Decided May 6, 1878.]

E. D. AUSTIN, Plaintiff and Respondent,

VS.

O. N. AUSTIN, Defendant and Appellant,

Appeal from Twentieth District Court, Santa Clara County,

D. BELDEN, Judge.

DIVORCE.

STATEMENT OF THE CASE.

The plaintiff and defendant intermarried in August, 1872, at Santa Clara County, and lived together until February 21, 1873, when plaintiff left defendant's house and domicile, and has not since cohabited with him. While living together defendant was in the habit of accusing plaintiff of adultery, charging her with acts of lewdness and adultery with divers persons. These accusations were made in the presence of plaintiff's daughter, and others, and were repeated by defendant to other people. Plaintiff had at all times conducted herself properly and consistently with her marital obligations. Defendant also struck, choked, and otherwise ill-treated plaintiff. All of which acts on the part of defendant caused plaintiff great mental and physical pain and distress.

Defendant, when he married plaintiff, owned a tract of land in Santa Clara County, containing 53 acres, and personal property, worth about \$25,000. Plaintiff owned no property at the time, nor did the property increase in value after their marriage. Plaintiff had filed a declaration of homestead on the whole of said property December 19, 1872.

Defendant was ordered to pay \$20 per month alimony while said action was pending, and \$200 as attorney's fees. W. H. Lowe was appointed receiver of the defendant's property to prevent him from disposing of it in fraud of the rights of plaintiff. This case was tried three times. Plaintiff incurred large expenses for costs of suit and council fees.

Plaintiff in her complaint charged specific acts of cruelty, ill-temper, etc., and prayed for a divorce—that the homestead be set apart to her—for \$100 per month alimony—for \$200 costs—and \$1,000 for attorney's fees.

Defendant made a general denial, and alleged various acts of adultery and lewdness on the part of plaintiff, and denied that he was worth more than \$500.

Judgment for divorce—and for \$540 alimony in arrears—\$750 counsel fees—\$750.90 costs and expenses of suit—\$25 per month alimony, 20 months from date of judgment, unless plaintiff dies or marries. There being no community property an order of sale was made to Sheriff of Santa Clara County, authorizing him to sell the property of defendant, and out of the proceeds satisfy the judgment and decree. Order was made giving defendant 20 days in which to make the payments above named.

Appeal was taken from judgment and decree February 9, 1878.

Judgment affirmed.—Remittitur forthwith.

F. E. Spencer, Attorney for respondent.

O. N. Austin, in *propria persona*.

[No. 6023.—Decided April 29, 1878.]

N. CASSNER, Plaintiff and Appellant ;

vs.

N. GOLDTREE et al., Defendants and Respondents,
Appeal from First District Court, San Luis Obispo Co.,

E. FAWCETT, Judge.

DAMAGES—Liability of landlord to keep building in repair.

STATEMENT OF THE CASE.

Plaintiff brings action against defendants for \$500 damages, and claims, and states, that in October, 1875, the defendants, who were partners, rented to him a building in San Luis Obispo City, at a rental of \$18 per month, which was punctually paid—that the intention between both parties was that the building should be occupied by human beings, and was occupied by plaintiff, who carried on his business there,—that by reason of defendant's neglect the premises became dilapidated and untenable,—that on January 16, 1877, and at other times, the rains entered and penetrated the roof thereof, and wet, destroyed, and injured plaintiffs' goods and merchandise to the extent of \$500 ;—which damage was caused by defendant's refusal and neglect to make repairs to the building, though often requested to do so by plaintiff ;—that, at the time of renting, there was no agreement as to who should put the premises in a fit condition for occupancy, or who should repair subsequent dilapidations.

Defendants, in answer, made a general denial, and also filed a demurrer, alleging that the complaint did not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and the case was regularly tried on May 17, 1877, plaintiff having elected to stand on his complaint, and declined to amend the same.

Judgment was rendered on May 21, 1877, dismissing the suit and taxing plaintiff with costs.

Appeal was taken by plaintiff July 7, 1877.

Judgment affirmed.

W. J. and E. Graves, attorney for plaintiff and appellant.

McD. R. Venable and O. P. Evans, attorneys for defendants and respondents.

[No. 5947.—Decided May 1st, 1878.]

H. WINTERS, Plaintiff and Respondent,
VS.

G. F. BROWNER, Administrator of the Estate of J. A. Gardiner, deceased, Defendant and Appellant.

Appeal from the Sixth Judicial District Court, Sacramento Co.

S. C. DENSON, Judge.

Action on promissory notes, against administrator of an estate.

STATEMENT OF THE CASE.

Plaintiff commenced suit against defendant, as administrator of J. A. Gardiner, deceased, to recover \$1,652.70, principal and interest, alleged to be due on three promissory notes made by Gardiner in favor of plaintiff, one for \$200, with interest at $1\frac{1}{4}$ per cent. per month, another for \$200 with interest at $1\frac{1}{2}$ per cent. per month, and one for \$600 with interest at $1\frac{1}{2}$ per cent. per month:—that Gardiner died intestate, on June 24, 1876, at Sacramento, and on July 17, 1876, after due and legal proceedings were had, defendant was, by the Probate Court duly appointed and qualified as administrator of Gardiner's estate:—that on February 3, 1877, plaintiff presented to defendant his claim for \$1,652.70, and that on March 17, 1877, defendant rejected the same.

Defendant demurred to the complaint, alleging that facts sufficient to constitute a cause of action were not stated—which demurrer was argued, and was then overruled, defendant excepting to the same.

Defendant, in answer, stated ;—that Gardiner did not at any time make, nor was the plaintiff ever the holder or owner of any of the notes sued for;—that suit was not commenced for more than three months and 10 days after plaintiff presented his claim,—and that action was barred by Secs. 1496 and 1498, Code of Civil Procedure.

Judgment for plaintiff for \$1,394, and for costs.

Bill of exceptions was filed by defendant, and motion for new trial made and overruled on December 14, 1877. Appeal by defendant from said judgment, and order taken December 31, 1877.

Judgment and order affirmed,

Add. C. Hinkson and A. C. Freeman, attorneys for defendant and appellant.

Creed Haymond and Ben Bullard, Jr., attorneys for plaintiff and respondent.

Nineteenth District Court Decision.

MONTGOMERY AVENUE IMPROVEMENT.

LOUIS DUTERTRE vs. WM. MITCHELL, TAX COLLECTOR.

[Decided June 22, 1878.]

OPINION BY WHEELER, J.

This is an application for an injunction restraining the defendant, who is the Tax Collector of said City and County, from selling certain lands of the plaintiff in satisfaction of a tax levied under the provisions of "An act to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor," approved April 1, 1872.

The act created a "Board of Public Works" to carry out its objects and purposes. It is apparent from the fifth section of the act that this board was to have no power, not even that of organization, until the owners of a majority in frontage of the property described in the act as benefited by the improvement should petition the Mayor for the opening of said avenue.

A petition was signed by various owners and presented to the Mayor; the board organized and the work proceeded to completion. The plaintiff now resists the payment of the tax assessed against his land on the ground that the whole proceedings were and are void, inasmuch as a majority in frontage did not sign the petition.

Assuming this allegation to be true, the question presented is, will any deed that the Tax Collector may execute, pursuant to the threatened sale, constitute a cloud on plaintiff's title? I have carefully examined the case of *Bucknall vs Storey*, 36 Cal., 67, and guided by the law as therein laid down, am compelled to hold that such deed would not constitute a cloud. The reasons assigned are substantially that the deed itself would not be *prima facie* evidence that the antecedent steps marked out by the statute had been taken: that the grantee, in making out his title under the deed, in an action of ejectment, would be compelled to prove his case, step by step; that among the things thus to be proven would be the fact that a majority in frontage had signed the petition to the Mayor; and that, inasmuch as the proof on this last proposition would necessarily fail, the title under the tax deed would fall of its own weight; hence, it would not constitute a cloud on plaintiff's title.

Had our Supreme Court not felt compelled to adopt the definition that the Courts of some other states have given to the term *cloud*, as applied to title, I

should unhesitatingly declare that the deed to be executed by the defendant, in case of a sale, would constitute a cloud of a very serious character. A cloud I suppose, is something that darkens the title, rendering it obscure or uncertain. That such a deed would darken the title of the plaintiff, is well known to every business man in the community, and to enable the plaintiff to sell his land at its market value, he would be compelled either to buy the interest of the grantee in the tax deed or obtain a decree in equity quieting his title.

It is useless, however, to discuss the matter further, as the case above cited disposes of this case; at least so far as the provisional injunction is concerned.

The application is, therefore, denied and the restraining order heretofore issued is vacated.

PATRICK PLOVER et al. vs WILLIAM MITCHELL, Tax Collector.

This case involves the same questions as the case of Dutertre vs. Mitchell, and is decided on the same grounds.

The application for injunction is denied and restraining order vacated.

DUPONT STREET WIDENING.

LEO MAURER et al vs. WILLIAM MITCHELL, Tax Collector.

THE DECISION OF THE COUNTY COURT AFFIRMED—THE APPLICATION FOR AN INJUNCTION DENIED AND THE RESTRAINING ORDER VACATED.

OPINION BY WHEELER, J.

This is an application for an injunction to restrain the defendant, who is the Tax Collector in and for said city and county, from selling certain lands of the plaintiffs' in satisfaction of a tax levied under "an act to authorize the widening of Dupont street, in the city of San Francisco," approved March 23, 1876.

The application was heard upon the bill and answer, affidavits and oral testimony, and was argued upon both sides with a degree of learning and ability rarely equalled in our courts of justice.

To discuss every point raised, and to review every authority cited at the argument, would render this opinion so voluminous as probably to preclude its perusal even by the counsel engaged in the case. I shall, therefore, merely outline the leading facts, and consider the questions which, in my judgment, dispose of the matters submitted.

The first section of the act declares that the width of Dupont street, from the northerly line of Market street to the southerly line of Bush street, shall, subject to the provisions of the act, be increased to the uniform width of 74 feet. The third section designates the district benefited by the improvement, and upon which the cost of making the same shall be assessed.

The 4th section constitutes the Mayor, Auditor and Surveyor of the City and County a Board of Commissioners to carry out the purposes of the act.

The 6th section provides that as soon as convenient after the passage of the resolution provided for by the 21st section, and which will be hereafter noticed, the commissioners shall publish a notice for not less than ten days in two of the

daily papers printed in the city of San Francisco, informing property owners along the line of said street that the board was organized, and inviting all persons interested in property sought to be taken, or which would be injured by said widening, to present to the board maps or plans of the respective lots, and a written statement of the nature of their claim or interest in such lots.

The 7th section directs the board to prepare and adopt suitable maps, plans and diagrams, and to ascertain and determine and separately state and set down, in a written report, the description and cash value of the lots and subdivisions of land and buildings included in the land taken for the widening of the street, and the damage done to property along the line of the street; also, a description of the lots designated in section 3 of the act, and opposite to such description to set against such lot or subdivision the sum or amount in which, according to the judgment of the board, the said lot has been or will be benefited by reason of the widening of said street.

The section further provides that such report, as soon as the same is completed, shall be left at the office of said board daily during ordinary business hours for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection at said time and place shall be published by said board daily for twenty days in two daily newspapers printed and published in said county.

The eighth section provides that said report shall be presented by the said board to the County Court, with a petition to the court that the same be approved and confirmed by the court, and that the court shall have power to approve and confirm said report or refer the same back to said board with directions to alter or modify the same in the particulars specified by the court in the order referring the same back; and, thereupon, the said board shall proceed to make the alterations and modifications specified in the order of such court. The alterations and modifications being made, the report shall be again submitted to the court, and if the court upon examination should find that the alterations or modifications have been made according to the directions contained in said order, the said court shall approve and confirm the same by an order to be entered on its minutes.

The act then goes on to provide that the damages, costs and expenses arising from, or incidental to the widening of said street, being fixed and determined by the final confirmation of the report, said board shall cause to be prepared and issued bonds of the city and county of San Francisco, in and for the amount necessary to pay and discharge all the damages, costs and expenses incident to the widening of the street.

The evidence presented shows that the board was duly organized and gave the ten days' notice required by section six of the act; that, afterwards, they proceeded, under the provisions of section seven, and prepared the report therein provided for; that afterwards, in the month of October, 1876, the report was presented to the County Court for its approval and confirmation; that certain persons owning land along the line of the street interposed certain objections before the County Court to certain portions of the report, claiming that in the matter of assessing damages and benefits, injustice had been done to them. The matter seems to have been under consideration and discussion

for the period of two months, and, finally, on the 20th of December, 1878, the report having been modified as directed by the County Court, it was on that day finally approved and confirmed. No action seems to have been taken after the date of the approval and confirmation on the part of any of the plaintiffs in this case, or on the part of any person interested in the widening of Dupont street, with a view to modifying, setting aside or in any manner disturbing the final order and judgment of the County Court approving said report; but, on the contrary, there seems to have been a general acquiescence in the correctness of the report and confirmation; and upon the basis of damages and benefits therein established, the widening of the street was commenced and conducted to final completion.

In the meantime, to raise sufficient funds to meet the incidental expenses, the board, under the authority of the statute, issued bonds to the amount of \$1,000,000. Those bonds were offered in the market and were purchased by various individuals, relying upon the fact that all the proceedings provided for by the statute had been properly taken, as found and determined by the judgment of the County Court. Nearly a year and a half having now elapsed, and a tax having been levied for the purpose of paying the interest on these bonds, and also to create a sinking fund for their final redemption, as provided by the act, the plaintiffs, for the first time, object to the regularity of the proceedings anterior to the judgment of the County Court, and claim that by reason of various departures from the letter of the statute together with the adoption of a false rule for the assessment of benefits and damages, the said tax is utterly null and void, and ought not to be enforced.

The first point made by the plaintiffs is, that the board never acquired jurisdiction to organize or to proceed with the work, inasmuch as the Board of Supervisors never expressed their judgment by a resolution or order that it was expedient that Dupont street should be widened in accordance with said act. It is required by section 21st of the act that the Board of Supervisors shall, within 60 days after the passage of the act, express such judgment by a resolution or order in such form as they may deem advisable. It is clear from the evidence that they did so express themselves by a resolution duly entered in the minutes of their proceedings. It is objected, however, by the plaintiffs, that such resolution was insufficient, because it was not duly advertised for the period of five days in some newspaper of the city.

This objection is answered by the fact that the act does not require any advertisement whatever. The objection is based not upon the act under consideration, but upon section sixty-eight of the Consolidation act, which requires the publication of certain ordinances and resolutions providing for specific improvements. I think this applies to resolutions for improvements which the Supervisors may authorize under their general powers. The act under consideration is special, and merely directs that the Supervisors *express their judgment*. This they did in proper form. But the resolution was published for five days; and the objection is, that one of the publications was made in the *supplement*, and not in the newspaper itself. The proof shows that the circulation of the supplement was co-extensive with the newspaper; and the authorities cited declare a publication thus made to be a sufficient compliance with the law.

The next objection is, that the board adopted a false rule for the assessing of damages and benefits. The only rule laid down, if such it may be called, is found in section seven. It is this: "The board shall ascertain and determine the actual cash value of the land taken for the widening, etc. * * * and shall set against each lot the sum in which, according to the judgment of the board, the lot has been benefited by the widening," etc.

It is a matter of great practical difficulty to determine accurately whether the results reached by the board were correct or incorrect. Probably no two boards that could be appointed would entirely agree as to damages and benefits along the line of a given street. It is more matter of opinion. Hence the law requires of the board its best *judgment* in the premises; and when so exercised, their determination will not be disturbed except for very grave causes (reasons).

In the case of Piper's appeal, 38 Cal., 530, the Supreme Court discuss the matter at great length. The court say: "The law, in the first place, requires three commissioners to be appointed to make the appraisement and assessment. They are not, like jurors, selected by lot out of all citizens possessing the statutory qualifications—good, bad, and indifferent, and of every grade of capacity and intelligence—but are selected with special reference to their fitness to discharge the particular duties devolved upon them by law in the given case. * * It is their duty to investigate the subject thoroughly; examine witnesses if deemed important; obtain all the information within their power; reflect upon the subject, and finally embody the result of their reflection and investigation in their report." The opinion then quotes largely from numerous cases decided in other states, and concludes by refusing to disturb the report. It will be observed that the case in 38 Cal. was an appeal from the order of the County Court confirming the report. There is no doubt of the legitimate power of the Supreme Court, on such appeal, to review the order of the court, also the report of the commissioners, and to reverse such order or modify the report, as in its judgment, the ends of justice may require.

But this is not an appeal; and this conducts us to the examination of two questions: First. Did the County Court acquire jurisdiction to deal with the report, and if it did, is its judgment of confirmation final? The power of the County Court to consider the report is contained in section 8 of the act. Section 7 directs that the report, when completed, shall be left for 30 days at the office of the board for inspection, and that notice that the same *is so open* for inspection shall be published daily for twenty days in two daily newspapers. This is all the provision the statute contains touching the subject of notice between the time the report is completed and its presentation to the County Court. Section 8 provides that any interested person, feeling himself aggrieved by the report, may, within the 30 days mentioned in section 7, petition the County Court for an order compelling the board to file the report with the court.

The object of this portion of section 8 is not very apparent, because the section concludes: "But in case no such petition shall be filed with said County Court within the time above limited, the report shall be presented by the board to said court, with a petition that the same be approved and confirmed." It thus appears that the report is destined to reach the County

Court in any event: first, upon petition of an aggrieved party, and, second, in the absence of such a petition, it is to be presented by the board. No such petition having been filed, the report was presented to the court by the board.

Thus it does not clearly appear that the 20 days' publication was a prerequisite to the presentation of the report by the board; but that the failure of an aggrieved person to petition the court was the precedent fact from which the board derived its power to present its report to the court. Plaintiffs insist, however, that the twenty days' publication was of jurisdictional consequence, and that a departure from the statute in this particular prevented the County Court from acquiring jurisdiction. They claim that the statute, in prescribing a publication of twenty days, means twenty *secular* days. The notice was published twenty secular days in one newspaper, and twenty-one days, including Sundays, in the other. It is urged by the plaintiffs that the statute should be strictly construed. A strict and literal construction would hold that publication for twenty days, including Sundays, was sufficient. This is plain, because the statute makes no qualification nor exception. It simply says it shall be published daily for twenty days. The Supreme Court has held, in several cases, that a notice directed to be published for a period of ten days, Sundays excepted, is duly published if it appear in the newspaper for eight secular days. That is, if the first day is Saturday, June 1st, and the last day is Monday, June 10th, the publication is good, though the notice did not appear either on the 2d or 9th. It is evident that the Legislature did not intend to exclude Sundays in the clause under consideration; first, because there are no words indicating such intention; and, second, because wherever in the act such intention existed, it is expressed. In section 11 this language occurs: "The Mayor * * * shall advertise for the period of sixty days by notice published daily, *Sundays excepted*." Again, in section 13, "shall advertise daily, for the space of ten days, *Sundays excepted*;" and again, in same section, "for the period of sixty days, *Sundays excepted*." Thus showing clearly that wherever the Legislature intended to exclude Sundays it has plainly said so. It was suggested at the argument that the phrase "*period of twenty days*" means something different from the phrase "*twenty days*." I cannot perceive the difference. If one person informs me he spent sixty days in London, and another person says he remained in London for a *period of sixty days*, I infer that the stay of one was equal to that of the other—neither longer nor shorter. Besides, in the 21st section of the act under consideration, the Legislature uses the phrase "*sixty days*" and the phrase "*period of sixty days*," as synonymous. If, then, the County Court's jurisdiction depended upon the publication for twenty days, as prescribed by section 7 of the act, as plaintiffs insist it did, it is clear that the section was strictly complied with and that the jurisdiction attached.

The remaining question is, What was the effect of the judgment of the County Court? The eighth section of the act clothes the court with plenary power over the report. This is too clear for argument. The court may approve and confirm the report on its presentation; or, if, in the opinion of the court, it needs any alteration or modification in any respect, the court directs the same to be made and refers it back for that purpose. And when

finally altered and modified to conform to the views of the court, it shall be approved and confirmed. The statute does not enumerate or limit the particulars in which the court may direct alterations to be made, but gives the court complete control of the report, with power to direct all modifications which, in the opinion of the court, law and justice may demand.

The Legislature, in conferring upon the court this important and delicate power, must have had some object. It must have intended that the judgment of confirmation should be followed by some substantial results; otherwise the act were vain. It is a fundamental rule in the construction of statutes, that it is not to be presumed that the Legislature intended that the results of its deliberate act should prove of no effect. Construction of a statute is but following out the intentment of the Legislature. The County Court is now a court of record, and its proceedings are construed with like intentments as the proceedings of courts of general jurisdiction. It has the same dignity, in a legal sense, that the Queen's Bench or Common Pleas of England ever had.

What, then, was the intention of the Legislature in clothing this court with the power to supervise, modify and finally confirm the report? It must have been to give to its order of confirmation the dignity and conclusiveness of a final judgment. If it does not amount to this, it amounts to nothing. This is also clearly shown by section 9 of the act. It says: "All damages, costs and expenses arising from, or incidental to, the widening of said street *being fixed and determined by the final confirmation of the report*," the board shall prepare bonds, etc. This puts the matter beyond question, and the judgment of the court was the end of the proceedings, unless the same was subsequently modified or reversed. It does not appear that any motion was ever made to set aside or modify the judgment, nor was any appeal ever taken therefrom. The judgment is, therefore, final and conclusive.

The plaintiffs insist that the rule of damages and assessments adopted was incorrect, and that the modifications ordered by the court were unjust and illegal. The answer is, even if this be true, they were merely errors committed by the court acting *within its jurisdiction*, and did not render the judgment void. They might have been corrected on motion or by appeal; but as all parties in interest, by their failure to take either of these steps, are deemed to have acquiesced in the judgment, it is now too late to complain.

It is an old rule of equity that the granting of injunctions is a matter resting in the sound discretion of the court, and that no injunction will be granted whenever it will operate inequitably or contrary to the real justice of the case, or where there has been unreasonable laches or delay by the party seeking this form of relief. The plaintiffs stood by, without protest or objection, until the desired improvement had been wrought out through the agency of the report and judgment now complained of; the basis on which the work proceeded was the one which their silence adopted and approved. The money used in accomplishing the work was realized from the sale of bonds to parties who had a right to rely on the sanctity of the judgment of the County Court. The lands of the complaining parties, at the inception of the widening scheme, fronted on a narrow and undesirable street; they now front upon a wide and elegant thoroughfare. The plaintiffs are enjoying the benefits of the scheme, and ought to pay the expenses legitimately adjudged against them. It is therefore ordered that the motion for an injunction be denied, and that the restraining order heretofore entered be vacated.

SYLLABUS OF THE
Supreme Court Commission of Ohio.

(June 12, 1878.)

[Religious belief of Witness.—Contradictory Testimony.]

SAMUEL K. CLINTON VS. THE STATE OF OHIO.

ASHBURN, J.:

1. Under an indictment charging a violation of section four of "An act to provide against the evils," etc., (S. & C. 1431,) it is not necessary to show that the nuisance existed at the time proceedings were commenced. It will be sufficient to show that it existed, in fact at sometime during the period named in the indictment.

2. No one is rendered incompetent to be a witness on account of religious belief; nevertheless, every one offered as a witness in a court must take an oath or affirmation before giving testimony.

3. A person who believes in the existence of a Supreme Being, who will, either in this life or the life to come, inflict punishment for false swearing, may be sworn as a witness.

4. A witness cannot be cross-examined as to any fact which is collateral and not material to the issue, merely for the purpose of contradicting him.

5. Answers elicited from a witness on cross-examination, as to his religious belief or his previous declarations in relation thereto, being collateral and not material to the issue, will not serve as a foundation to call witnesses to contradict him.

Judgment reversed.

(Cleveland Law Reporter.)

WOMEN IN THE COURTS.

The Judiciary Committee of the U. S. Senate hold the view that women are admissible to practice as barristers in the United States Courts. A bill went before the committee recently, providing that women who have been members of the Bar for three years in any State or territory, shall be admitted to practice in the Supreme Court of the United States, and that no person shall be excluded from practising as attorney or counsellor before any court of the United States, on account of sex. Holding the view that there is now no law excluding females from the Bar in the courts mentioned, the Senate saw no necessity for the passage of the bill, and accordingly reported adversely to it.

The friends of the measure regard this action of the Senate as an evasion of the issue, because, in point of fact, the Courts do not admit women to practice, and the U. S. Supreme Court has refused to entertain an application for admission in behalf of a woman. She is in the same position, therefore, as if expressly excluded by the law. It is generally conceded that if all restrictions were removed, not a dozen women in the Union would avail themselves of the liberty granted. The easiest solution of the difficulty would probably be to grant the privilege requested, and the anxiety to appear in the courts would then fade away.—*Montreal Legal News*.

SUPREME COURT.

Calendar for July Term. 1878.

Court meets at San Francisco on Monday, July 8, 1878. at 11 o'clock A. M. The Clerk requests all applicants for examination to file their certificates before Saturday, July 6th.

MONDAY, JULY 8TH.

Motions.

6045—*Ex-parte* Wm Smith, for writ of *certiorari*.

Examination of applicants, for admission to practice.

TUESDAY, JULY 9TH.

10,304—People vs. Jones.
10,325—People vs. Carick.
10,334—People vs. Bailly.
10,337—People vs. Van Delesr.
10,346—People vs. Gibbs.
10,347—People vs. Fong Ah Tuck.
10,348—People vs. Bevans et al.
10,349—People vs. Platt.
10,352—People vs. Ball et al.
10,353—People vs. Felix.
10,354—People vs. Herrera.

WEDNESDAY, JULY 10TH.

5411—Felton et al. vs. Robinson.

THURSDAY, JULY 11TH.

6040—City of Los Angeles vs. Baldwin et al.

5878—Pollard vs. Leff.
5833—Stewart vs Tipton et al
6095—People *ex rel*, Tyler vs Cal. Bridge and Building Co.

MONDAY, JULY 15TH

5884—City of Stockton vs Reid et al
5893—Vilhac vs Stockton & lone R. R. Co
6005—Hewell vs Lane
6037—In the matter of the estate of James Holbert, deceased
6109—Ferry vs Hammond
6123—Meroux vs Weber

TUESDAY, JULY 16TH

5586—Smith vs Merchant et al
5793—People *ex rel* Hastings vs Jackson & Devlin
5964—Hidden vs Jordan et al
6042—Morgenstern et al vs Hilborn et al
6084—Anderson et al vs Coleman

WEDNESDAY, JULY 17TH

5160—Young vs Thompson.

5283—Shinn vs Young
5925—Adler vs Winkle
6118—Hudson, Admin'r vs Irwin et al
6086—Hardy vs Macpherson
6091—Sampson vs Stickney et

THURSDAY, JULY 18th

4707—Hoke vs Perdue
5306—Hager vs Spect
5336—Belcher vs Chambers et al
6101—S. F. Savings Union vs Dufficy et a
6125—Bank of California vs Fresno Canal and Irrigation Co.

MONDAY, JULY 22D

5944—Miller vs Henderson
6069—Laswell vs Gaemliok
6085—Jackson vs Stone
5587—Snow vs Kimmer et al
5997—Winnegar et al vs Purrington et al
6061—Osgood vs El Dorado Water and Mining Company

TUESDAY, JULY 23D

5354—Seymour vs Wood et al
5433—Santa Clara Valley Peat Fuel Company vs Tuck
5830—Prescott vs Salthouse et al
5851—Hale vs McLea
5954—City of San Jose vs San Jose and Santa Clara Railroad Company

WEDNESDAY, JULY 24th

6032—Sullivan vs Beardsley
6041—Reynolds vs Groneville
6056—In the matter of the estate of David Gharky, deceased
6060—Otto, administrator, vs Mann
6121—Anderson et al vs Aguayo

THURSDAY, JULY 25TH.

3698—Bigley vs Nunan
4631—Hart et al vs Finnegan
4770—Howden vs De Young
4970—Lyons vs Beale et al
4988—Winter vs Belmont Mining Co

MONDAY, JULY 29TH.

5025—Brooks vs Carpentier et al
5040—Tulley vs Tranor et al
5117—Levy vs Haake et al
5141—Shaw vs Wandesforde et al
5400—Meagher vs Thompson

TUESDAY, JULY 30TH.

5481—Harkins vs Nelson
5496—Robinson vs Pittsburgh R R Co
5510—Ambrose vs Roper et al.
5517—Read vs Mahoney et al.
5524—Clay vs Marriott.

WEDNESDAY, JULY 31st.

5531—Forbes et al vs McDonald e

5534—Chicago Taylor Printing Press Co
vs Lowell
5535—Friedman vs Nelson et al
5552—Spinetti vs Brignardello et al
5557—Clark et al vs City and County
of San Francisco et al

THURSDAY, AUGUST 1ST.

5558—Davis et al vs Spring Valley Water
Works et al
5565—Reed vs Goldstein et al
5566—Young vs City and County of San
Francisco
5567—Kits et al vs Lady Bryan Mining
Company et al
5573—Scher vs Himmelmann

MONDAY, AUGUST 5TH

5575—Stoddart vs Burge
5579—City and County of San Francisco
vs Spring Valley Water Works
5582—People vs Felton
5595—Taylor et al vs Brenham, exec'x et al
5598—Raisch vs City and County of San
Francisco

TUESDAY, AUGUST 6TH

5601—Vigoureux vs Murphy
5605—Black vs Sprague et al
5624—De Witt et al vs Hastings
5629—Comper vs Rowe
5632—Brandow vs Whitney et al

WEDNESDAY, AUGUST 7TH

5644—Le Roy et al vs Dunckerly et al
5645—Taylor vs Reynolda, executrix
5646—McConaghey vs Lyons
5648—Judson vs Seligman et al
5657—Bianchi et al vs Hood

THURSDAY, AUGUST 8TH.

5661—Salisbury et al vs Shirley et al
5664—Parker vs Altschul et al
5665—Bourk vs Ried
5667—Tobleman vs Reay et al
5673—Murray vs Green et al

MONDAY, AUGUST 12TH

5679—Noe vs Spilvalo et al
5681—Hibernia Savings and Loan Society
vs Herbert et al
5682—Diggins vs Sawyer et al
5683—Curry vs Alvarado et al
5694—Curry vs Alvarado et al

TUESDAY, AUGUST 13TH

5686—Merle vs Thorpe et al
5695—Springer vs Rice
5696—Commercial Bank vs Baldwin
5700—Ellis et al vs Kneeland et al
5707—Potter et al vs Mercer et al

WEDNESDAY, AUGUST 14TH

5709—Rondebush vs Gladding

5712—Greentree vs Newberg
5713—Dowd vs Clarke
5723—Dyer vs Treadwell et al
5729—Davis vs McDonald & Whitney

THURSDAY, AUGUST 15th

5731—Stone vs Garnett
5736—Norton vs McCourtney et al
5739—People ex rel Alvord vs Pope et al
5740—Pope et al vs City and County of
San Francisco et al
5757—Bacon vs Robson et al

MONDAY, AUGUST 19th

5760—People vs Pittsburg Railroad Co.
5770—Chapman vs Quinn
5771—McKeen vs Turney et al
5772—McCombe vs Lawrence
5778—People ex rel Att'y Gen'l vs San
Francisco and P't Lobos Road Co.

TUESDAY, AUGUST 20th.

5781—Herman vs Haffenegger.
5787—Rider et al vs Edgar
5789—Bancroft et al vs Heringhi et al
5796—Wetherbee et al, vs Williams et al
5799—Alvarado et al vs Celia

WEDNESDAY, AUGUST 21st

5805—Himmelmann vs City and Co of
San Francisco.
5807—Diggins vs Reay et al
5811—Gleeson vs Gleeson
5816—Macpherson vs Davis
5817—Wakelee vs Davis

THURSDAY, AUGUST 22d.

5812—People ex rel Com. of Transporta-
tion vs Central Pacific R. R. Co.
5813—People ex rel Com. of Transp'n vs
Stockton & Copperopolis R R Co.
5814—People ex rel Com. of Transporta-
tion vs. Southern Pacific R. R. Co.
5815—People ex rel Com. of Transporta-
tion vs Central Pacific R. R. Co.
5819—S F Savings Union vs Johnson et al

MONDAY, AUGUST 26th.

5821—In the matter of the estate of Lucca
Radovich, deceased
5822—Corrwall vs Davis
5825—Avery vs Meigs
5831—Clark vs Porter
5832—Emanuel vs Ipswitch

TUESDAY, AUGUST 27th

5836—Hawley vs McCredy et al
5843—Fraser vs Reay et al
5860—Seaders vs Post Publishing Co.
5862—Coburn vs Smart et al
5863—Coburn vs Smart et al
5864—Coburn vs Smart et al

WEDNESDAY, AUGUST 28th

5865—Bank of Cal. vs Stratman et al

5868—Hutchinson et al vs State Investment and Insurance Company.
 5870—Shay vs McNamara
 5771—Roper et al vs Cotter et al
 5872—Holladay vs Hare.

THURSDAY, AUGUST 29th

5873—McDermott et al. vs. Mitchell.
 5877—Conniff vs Kahn.
 5879—In the matter of changing and modifying the grade of Montgomery avenue, etc
 5881—Parsons vs Armstrong
 5882—Durkee vs Central Pacific R. R. Co.

MONDAY, SEPTEMBER 2d

5883—Porter vs Woodward et al
 5887—Greer vs Tripp
 5889—Sackett vs Johnson
 5892—Morse vs Alameda County
 5895—O'Neil vs O'Neil et al

TUESDAY, SEPTEMBER 3d

5896—Board of Education of the city and county of S. F. vs Keenan et al
 5899—Board of Education of the city and county of S. F. vs Martin et al
 6063—Board of Education of the city and county of S. F. vs Donohue et al
 5906—Roussett vs Green
 5907—Marlow vs Barlow et al

WEDNESDAY, SEPTEMBER 4th

5909—Scott vs Dyer et al
 5911—Page vs Williams
 5912—Behrmann vs Barto
 5913—Stewart et al vs Mahoney Mining Company et al
 5914—Smith vs Tyler

THURSDAY, SEPTEMBER 5th

5927—Peterson et al vs Evans et al
 5928—Shay vs Lady Bryan Mining Company et al
 5939—Fitch et al vs Friable et al
 5945—Salter vs Baker et al
 5952—Upstone vs Weir

MONDAY, SEPTEMBER 9th

5956—Barber et al vs Stanford et al
 5957—Main et al vs Hilton et al
 5958—McLeran vs McNamara et al
 5962—Speirs vs Duane et al
 5969—Page, administratrix, vs Tucker et al

TUESDAY, SEPTEMBER 10th

5970—Low vs Mahe
 5971—Richardson vs Musser et al
 5977—Brady vs Bartlett et al
 5981—Harding vs Minear
 5982—Preston et al vs Eureka Artificial Stone Company

WEDNESDAY, SEPTEMBER 11th.

5983—Kelly vs Morgan et al.
 5985—Hansen vs Martin
 5986—Du Brutz et al vs Jessup
 5988—Reiner vs Hardy
 5990—Dent vs Holbrook

THURSDAY, SEPTEMBER 12th.

6002—Mahoney vs Braverman
 6003—Dowd vs Maynard, Auditor, etc.
 6007—McManus vs Brumagim
 6015—Paulson vs Nunan
 6018—Hooper et al vs Flood et al

MONDAY, SEPTEMBER 16th.

6020—Helbing et al vs Svea Fire Ins Co.
 6027—Payne et al vs McKinley et al
 6028—Jewell et al vs McKinley et al
 6029—Burke vs Burr et al
 6030—Dingley et al vs Greene et al
 6031—Dingley et al vs Greene et al

TUESDAY, SEPTEMBER 17th.

6039—Sinon vs Sullivan
 6043—Parrott vs Floyd et al
 6044—Harpending vs Myers et al
 6054—Brady vs Kelly
 6055—Jordan vs Hubert, Treasurer, etc.

WEDNESDAY, SEPTEMBER 18th.

6057—Kellogg vs Mayer, administrator
 6058—In the matter of the estate of Edmund Brooks, deceased.
 6070—Wood vs Orford et al
 6071—Miller vs Sharp et al
 6075—Boingneres vs Boulon

THURSDAY, SEPTEMBER 19th.

6079—Chamberlain vs Pacific Wool Growing Company
 6080—In the matter of the estate of Albert Berry, deceased
 6082—Smith vs East Branch Mining Co.
 6087—Helm vs Underhill
 6088—Douglas et al vs Fulda et al

MONDAY, SEPTEMBER 23d.

6090—Guerin vs City and County of San Francisco
 6092—Wilke vs Cohn
 6093—Grady et al vs Porter
 6096—Pancoast vs Pancoast
 6097—Hoff vs Funkenstein

TUESDAY, SEPTEMBER 24th.

6098—Wells vs Harter et al
 6100—Heathal vs Myles
 6102—Haskell vs Haskell
 6103—Phillip vs Lowrey et al
 6104—Olney vs Sawyer et al

WEDNESDAY, SEPTEMBER 25th.

6107—Byrnes vs Claffy

CALIFORNIA LEGAL RECORD.

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No. 15.

Legal Notes.

IMPORTANT DECISIONS BY THE WASHINGTON COURT OF CLAIMS.—The Court of Claims rendered an important decision in the case of the Union Pacific Railroad against the Government. The Court decided that the Government is entitled to recover 5 per centum of the road's net earnings from the 6th of November, 1869, to the 5th of November, 1874, inclusive, amounting to the sum of \$1,367,716, and that the company is entitled to recover \$593,627 as one-half of the compensation due from the Government for services rendered, and that for the difference between these sums, to wit, \$774,089, judgment is rendered in favor of the Government and against the claimants.

The Court also rendered a decision in the case of the Pacific Mail Steamship Company against the Government, to the effect that the claimants are entitled to recovery for a voyage of the steamship City of Peking in the sum of \$41,666, for carrying the United States mails between San Francisco and China, in 1875. Judgment to the above amount is given in favor of the claimants and against the Government.

OPINION IN THE GARDNER CASE.—In the Sacramento District Court Judge Denson rendered a written opinion in the case of the People vs. Robert Gardner, Ex Surveyor-General of the State of California. The opinion is very carefully and ably written, and reviews all the points presented by counsel and the accounts of Mr. Gardner during his term of office. In conclusion Judge Denson finds that the balance due from Robert Gardner to the people of the State is \$3, 261 89.

APPEAL OF THE DUPONT ST CASE.—6140—Maurer et al Vs Mitchell' Tax Collector, etc.—Upon motion of T. B. Bishop, of counsel for petitioners, and on filing petition and affidavit for a writ of prohibition:

Ordered that William Mitchell, Tax Collector of the city and county of San Francisco, do desist and refrain from further proceedings in the matter of the collection of the tax or assessment, commonly called the Dupont-street assessment, levied to pay the expenses of the widening of Dupont street, to said city and county, and from selling any lands to pay said tax or assessment until further order of this Court, and to show cause before this Court on Tuesday, the 9th day of July, A. D. 1878, at 11 o'clock, A. M., at the court room of this Court, in said city and county of San Francisco, why he should not be absolutely restrained from any further proceedings in that matter, and that an alternative writ of prohibition issue out of this Court to said William Mitchell, as prayed for in said petition, returnable on said 9th day of July, A. D. 1878, at 11 o'clock, A. M., before this Court, at the said court room thereof.

NILES, J.

McKINSTRY, J.

CROCKET, J.

A CURIOUS INSTANCE of the misapplication of the English language occurred in the course of the investigation of the charges against some of the officers of the Wisconsin Deaf and Dumb Institution. The testimony of one witness, a male mute, was set down as worthless, because it was entirely "hearsay evidence." In view of the fact that the witness could by no possibility either "hear" or "say," the unfitness of the term "heresay" is obvious.

WORK RESUMED in the State Printing Office Monday, and is expected to last about six months.

INTERNATIONAL LITERARY CONGRESS—PARIS June 27.—The International Literary Congress has accepted as a basis for its decisions, the principle advocated by Victor Hugo in his speech, urging that a book once published becomes in part the property of the Society, and after the author's death his family cannot prevent its re-issue, but the author's heirs should be entitled to from five to ten per cent, of the profits. That in case there are no heirs, the profits should revert to the State, to be applied to the encouragement of young writers.

The Congress resolved that the right of the author in his work is not a legal concession, but a form of property, which legislation should guarantee to his heirs and representatives in perpetuity; and that after the expiration of the term of copyright fixed by existing laws in different countries, any body may freely republish literary works on condition of paying a percentage to the heirs.

THE SHASTA COUNTY GRAND JURY has been examining into the matter of liquor licenses in that county, and find that dealers selling liquor in less quantities than one quart, had nothing but a trader's licence, while others supposed a Federal license was all they needed. The Jury found presentments against twenty-two persons for misdemeanors for violating the law in regard to county licences. and show that the action was not intentional, but through ignorance of the law. Section 3,382 of the Political Code provides for licences to traders and livery stable keepers, and section 3,383, says the sale of liquors and wines under preceding section must not be in less quantities than one quart, etc.

A PARIS COURT has decided that where a shop-keeper show an engraving in a frame marked, "This engraving—frances," the frame in which it is shown goes with the engraving—that an offer of this sort made to the public is as binding as it would be if made to an individual.

TRIAL BY JURY—ATTORNEYS' COLLECTIONS.—The right of trial by jury does not apply to every case. If a lawyer fails to pay over moneys collected in a suit for his client, the court may summarily order him to do so, and if he claims a lien on the moneys, for services rendered, he cannot ask for a jury to determine the question, but it must be settled by a reference. That is the decision of the New York Court of Common Pleas in the case *Matter of Fincke*, 6 Daly, 111, where an attorney, who had received \$2,665.08 on a partition suit, refused to pay any part of the same over to his client, claiming he had performed services for her worth that amount. The court, upon the application of the client, issued an order to show cause why the amount should not be paid over, and upon the appearance of the attorney ordered a reference of the matter. The referee reported that the attorney had performed services worth \$1,314.10, and the court ordered him to pay his client the balance, \$1,350.98. This disposition of the case is in accordance with *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, where it is held that an attachment may be issued against an attorney who retains money that belongs to his client and refuses to pay it over, and that even good faith is no exemption from such remedy, as the court, in that case, says: "The law is not guilty of the absurdity of holding that, after a client has spent years in collecting through his attorney a lawful demand; he shall be put to spending as many more to collect it from his attorney, and if that attorney should not pay, then try the same track again." And in *Re Paschal*, 10 Wall. 491, it is said by the Supreme Court of the United States, that for refusal by attorneys to pay money collected for their client in a suit, "the court may entertain summary proceedings by attachment," "and may, in its discretion, punish them by fine and imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty under pain of discharge or imprisonment." 4 Blackst. Com. 288. See, also, *Barry v. Whitney*, 3 Sandf. 696, *Grant's Case*, 8 Abb. Pr. 357; *Hess v. Joseph*, 7 Robb, 606; *Ex parte Ketcham*, 4 Hill, 564; *Saxton v. Wykoff*, 6 Paige, 182; *Wilmerdings v. Fowler*, 14 Abb. Pr. (N.S.) 249; *Merritt v. Lambert*, 10 Paige, 352.

Supreme Court Unwritten Opinions.

[No. 5687—Decided April 29, 1878.]

J. B. BURKHART, Plaintiff and Respondent,

vs.

C. MEYERSTEIN, ET AL., Defendant and Appellants.

Appeal from Eighteenth District, San Bernardino County.

W. T. MCNEALY, Judge

BREACH OF CONTRACT—DAMAGES.—

STATEMENT OF THE CASE.

This is an action for the breach of a contract for the transportation of freight from Spadra, Los Angeles County, to Panamint, Inyo County and back.

The plaintiff alleged that on December 1st, 1874, defendants who were doing business under the firm name of Meyerstein & Co., agreed with him and one Fredley, they being the owners of a mule team, to furnish freight to the full capacity of such team for the period of eleven months from that date, and to pay for transportation thereof 4 cents per pound gold coin, from Spadra to Panamint, and $1\frac{1}{2}$ cents per pound coming back. Plaintiff and Fredley entered into the performance of the contract and continued so to do until May 28th, 1875, when defendants failed and refused to furnish plaintiff with freight though often requested to do so. The capacity of the team was 16,000 pounds per trip each way. On February 1, 1875, Fredley assigned his interest in the contract to plaintiff. Plaintiff claimed \$5000 damages for such breach of contract by defendants.

Defendants in answer, denied the contract and the damages and plead an account of \$17.50 between the parties, to defeat recovery.

The case was tried without a jury. Judgment was rendered in favor of plaintiff for \$3,582, and costs. Defendants moved for a new trial which was denied, and the appeal is from the

judgment, and order refusing a new trial. Judgment and order affirmed. Remittitur forthwith.

C. W. C. Rowell, attorney for plaintiff and respondent.

J. N. Satterwhite and *H. C. Rolfe*, attorneys for defendants and appellants.

S. M. Wilson and *W. W. Cope*, of counsel for appellants.

[No. 5784.—Decided April 29, 1878.]

SWAMP LAND DISTRICT No. 150, Plaintiff and

Appellant.

vs.

LUCINA K. FERAN, Administrator of the Estate of Henry Feran, deceased, and Tiery Wright, Defendants and Respondents.

Appeal from Sixth District Court, Sacramento County,
S. C. DENSON, Judge.

LITIGANT—Delinquent reclamation assessment.

STATEMENT OF THE CASE.

Plaintiff states that it is a municipal corporation and consists of what is known as "Merritt's Island" in Yolo County. On April 18, 1874, the owners of land in said district elected three Trustees to effect the work of reclamation of said district. On May 11, 1874, the Trustees reported to the Board of Supervisors of Yolo County the plans of work, estimates of costs, etc., amounting to \$37,973.78—the Board appointed three Commissioners to make assessment of costs and expenses. May 20, 1878, the Commissioners made the assessment and filed a list with description of land, number of acres, etc., with the County Treasurer, who on August 4, 1874, returned the same containing assessments due and unpaid to the District Attorney.

That Henry Feran owned two tracts of land in said district and was assessed for \$3,189.12. That said Feran died intestate May 6, 1875. That Lucina K. Feran was appointed administratrix by the Probate Court of Yolo County, May 25, 1875, That Tiery Wright had a mortgage upon said land,

which interest was subordinate and subject to the liens of the assessment made. Defendants filed a demurrer which was overruled, and then in answer stated: A general denial of all allegations made, and further answer, that the order of the Board of Supervisors, forming District No. 150 was null and void; that the estimates of costs and expenses for said reclamation were based upon amounts expended for private work, counsel and litigation fees, lobby services, etc., and were fraudulent and incorrect. That defendant had paid the State in full for his land; but the County Treasurer did not credit him with 80 cents an acre which he was entitled to; and for counter claim, defendant states, that defendant's land was inclosed by a private levee, worth at the time of said assessment \$8,000, credit for which he was entitled to on said assessment, which amount was offered as set off against said assessment.

The case was tried without a jury, upon proofs presented by plaintiff, (defendant introducing none) and findings being waived. Judgment for defendants with costs. Appeal was taken from said judgment August 14, 1877. Judgment and order affirmed. Remittitur forthwith.

F. E. Baker, and *W. B. Treadwell*, attorneys for plaintiff and appellant.

J. W. Armstrong and *G. C. Freeman*, attorneys for defendants and respondents,

[No. 363.—Friday, May 31, 1878.]

Circuit Court of the United States.

DISTRICT OF OREGON.

VIOLET W. ELLIOTT vs. JOSEPH TEAL, substituted
for Samuel Tillard.

Action to recover possession of real property.

- (1). **ABATEMENT OF ACTION.**—The rule of the common law that an action abated by the termination or transfer of the plaintiff's interest therein, *pendente lite*, is abrogated by § 37 of the Or. Civ. Code, which declares that no action shall abate for any such cause; and § 27 of said code which provides that "every action shall be prosecuted in the name of the real party in interest, must, in connection with said § 37 be taken to mean that every ac-

tion shall be commenced in the name of the real party in interest.

- (2). JURISDICTION—PARTIES. The vendee of the plaintiff in an action to recover possession of real property is not a party thereto, and therefore his citizenship is an immaterial matter and in no way affects the jurisdiction of the national courts.

DEADY, J., Judge.

This action is brought to recover the south half of the donation of William and Violet W. Berry, the same being the wife's half of claim No. 53, in township 10 south, of range 5 west of the Wallamet meridian, and containing 319.90 acres.

Tillard answered that he was in possession simply as the tenant of Teal, whereupon the latter, on his own application, was made defendant in place of the tenant.

On September 3, 1877, the defendant Teal answered, denying the ownership of the plaintiff, and pleading title in himself.

On April 29, 1878, the defendant applied for leave to file a supplemental answer, alleging that since the commencement of this action, and some time in November, 1877, the plaintiff had conveyed the premises to a citizen and resident of the State of Oregon; and that the plaintiff has now no interest in the event of this action, and is not the real party in interest, and, therefore, "this court has no jurisdiction of this cause."

The application is resisted by the plaintiff upon the ground that the facts sought to be pleaded are *immaterial*.

§ 105 of the Or. Civ. Code provides that the defendant may be allowed to make a supplemental answer alleging "facts material to the case" occurring after the former answer.

At common law, any matter of defense, arising after a plea, was pleaded as a matter arising *purs darrien continuance*, and might be either in abatement or bar of the action. But, in either case, such a plea was a waiver of any plea or defence which preceded it—at least when the former was inconsistent with the latter. (1 Chit., p. 695-7, 2 Wend, 300; 34 Barb., 200). § 105 *supra*, is merely the common law rule upon this subject adapted to the code practice and nomenclature. Therefore the allegation in the proposed answer to the effect that the defendant does not admit but still denies that the plaintiff is or was at the commencement of the action the owner of the premises in controversy is not entitled to be considered. For the defence in the supplemental answer and the prior plea of ownership in the defendant are either consistent or inconsistent. If they are consistent the allegation is immaterial, but if inconsistent it is of no effect because a party cannot impliedly admit that a former defence is untrue and at

the same time allege that it is true—in other words, cannot waive such defence by pleading another contrary to it and also insist upon it. But is this matter “material”? At common law the death of a plaintiff, or the termination of his interest in the subject matter of the action might be pleaded in abatement of it. (1 Chit., p. 25, 482; 1 Bac. Ab., 22). To remedy the inconvenience resulting from the application of this rule in case of the death of a party, statutes were enacted providing for the continuation of the action by the personal representative of the deceased. § 37 of the Or. Civ. Code goes farther and provides: “No action shall abate by the death, marriage or other disability of a party, *or by the transfer of any interest therein*, if the cause of action survive or continue. In case of the death, marriage or other disability of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest.”

By this section it is expressly provided that the termination of the plaintiff's interest in the subject of the action shall not abate it—and this applies to and includes a case like this, where the termination of such interest is alleged to arise from a voluntary transfer thereof. The subject of this action is the right of possession of the premises mentioned in the complaint. Such right is not extinguished by the transfer, but passes to the plaintiff's alleged vendee. It may therefore be admitted that the plaintiff, if the fact be as alleged, is not the real party in interest, and therefore not entitled to prosecute this action within § 27 of the code, which provides that “Every action shall be prosecuted in the name of the real party in interest.” But the operation of § 27 is modified by § 37 *supra*, which in effect provides that when an action is commenced by the real party in interest his subsequent transfer of such interest “shall not abate the action or prevent his prosecuting it to final judgment or its being so prosecuted in his name, for the benefit of whom it may concern.” This question was thoroughly considered in *Moss v. Shear*, 30 Cal., 475, and in *French v. Edwards*, 4 Saw., 128, and the conclusion reached that a conveyance of the premises *pendente lite*, did not abate an action for the possession or prevent its being further prosecuted in the name of the vendor. To the same effect is *Camarillo v. Fenlon*, 49 Cal., 203.

But it is said that the California statute (§ 16 Prac. act, § 385 C. C. P.) under which these rulings were made, contains a provision expressly authorizing the court, in the case of a volun-

tary transfer *pendente lite*, to allow the action to be continued in the name of the original party or the vendee. This provision is not in the Or. Code. and it may therefore be admitted that under it, there is no power to substitute the person to whom the transfer is made for the plaintiff. But what follows. Why simply, that the action *must* be prosecuted in the name of the original plaintiff unless it is to abate—a result which § 37, *supra*, expressly provides shall not happen. It is plain, then, that both codes having provided that an action commenced by the real party in interest may be prosecuted to final judgment in his own name notwithstanding a transfer of his interest therein. This right to continue the action in the name of the original party is not conferred by the provision in the California statute which *permits* it to be so continued or in the name of the vendee, but necessarily results from the prior provision that the action shall not abate.

No decision of the Supreme Court of this state upon the point has been cited. So far as the question before the court is concerned, the statutes of Oregon and California are the same and the cases decided under the latter are directly in point. Upon the statute of this State there appears to be no room for argument. It is expressly provided that an action shall not abate by reason of any transfer of interest therein, and therefore it must continue and be prosecuted as though such transfer had not taken place.

It follows that the facts set up in the proposed answer are not material in this action, and therefore the application is denied.

But probably this motion ought not to be disposed of without noticing the fact that the proposed answer not only alleges the transfer of the premises by the plaintiff, but that the person to whom such transfer was made is a citizen of the same State as the defendant—the state of Oregon, and that therefore “this court has no jurisdiction of the cause” It would seem from this and phases of the argument for the motion that this supplemental answer was intended as a plea to the jurisdiction of the court on the point of the citizenship of the parties rather than in abatement of the action.

But the vendee of the plaintiff is not a party to this action, and therefore it is immaterial what is *his* citizenship. If it was sought to substitute him as a party to the action in place of the plaintiff, then the question of his citizenship would become material. But as it is, the matter is of no moment whatever. The transfer of the premises by the plaintiff to a third person,

pendente lite, unless it operates, as at common law, to abate the action, can have no effect upon it whatever, and in this respect the citizenship of the party to whom the transfer is made is immaterial. But § 37 *supra* having provided that such transfer shall not abate the action, it continues as though the alleged conveyance had never been made. The statute was made to promote utility and convenience in the prosecution of remedies by doing away with the unnecessary expense and delay of commencing a second action for the same cause, on account of the death of a party or the transfer of his interest during the progress of the action.

W. Lair Hill, for the motion.

Addison C. Gibbs, contra.

Supreme Court of Tennessee.

WALKER vs CLARK, ET AL.

Nashville, March 9, 1878.

ASSIGNMENT OF AN ILLEGAL NOTE.—A party purchasing property, and paying for it by assignment of a note indorsed "without recourse," and which bears on its face the rate of interest not allowed by law, and which consequently, cannot be enforced by law in our Courts, cannot, in the absence of fraud, deceit, or bad faith, be held liable, either on an implied warranty growing out of such a contract, or for the original consideration. Case cited: *Boyd vs Anderson*, 1 Tenn., 437; *Byles on Bills and Notes*, 252.

FREEMAN, J., delivered the opinion of the Court.

A respectful but earnest petition for rehearing has been presented in this case. We have given it careful consideration, and proceed to state the result.

On the main question to which the former opinion was addressed, after careful examination, both on principle and authority, we not only have no doubt of the correctness of our views then given, but, on reflection and re-examination, think the conclusion arrived at is beyond question.

Apparently, exceptional cases may be found, but on careful examination, no case can be found, well considered holding a different doctrine.

The case of *Boyd vs. Anderson*, 1st Tennessee Reports, 437, is, at first sight apparently such a case. There a party had

given his bond, in consideration of five hundred dollars, to transfer to the plaintiff a land warrant for six hundred and forty acres of land. Plaintiff applied to him for the warrant, and he procured one from Lytle, and had the same assigned in fulfilment of his contract. A Board of Commissioners had been appointed by the State of Tennessee, to adjudicate the validity of land warrants of this class, and were authorized to ascertain such as were *bona fide* and fairly obtained, and such as were fraudulent, and to declare the latter void. This warrant was presented to the Board, and was adjudged void, as having been fraudulently obtained originally, whereupon the purchaser brought suit to recover back the money paid for the warrant, and was held entitled to recover. This was clearly correct. The party had contracted and was bound to deliver a valid warrant, one that would enable the purchaser to appropriate six hundred and forty acres of land. The delivery of a void warrant was not a compliance with such contract, neither party knowing the fact at the time, and when the warrant was ascertained to be void, the consideration for the money paid had clearly failed, and the party paying had a right to recover the money so paid. Neither party, as we have said, knew the fact that the warrant was void, and there was nothing on the face of it to show this fact. It is said, in argument here, the party got what he contracted for, a land warrant, yet recovered. But this is not correct, he contracted for a valid land warrant, and this was not such—was not in fact a warrant at all, except in form—and he knew nothing to the contrary till it was so adjudged.

The case before us is a very different one. The party sells the note for an interest in land owned by Walker. On its face it is for 10 per cent. interest, and the purchaser buys this specific note, with a full knowledge of what it is. The seller refuses to bind himself to make it good by indorsement. He not only does this, but he transfers it, with a special contract, that there shall be no recourse on him arising out of such transfer, and this is accepted by the purchaser, and thereby becomes his contract, as well as that of the seller. Now on

what principle can the seller of such a note, under these circumstances, be held liable, contrary to the contract of the parties, to pay in money for the interest in land, when he has only agreed to give, and the other to accept, this particular note, and that without his personal liability on the same? Certainly he must be held responsible, if at all, not on the contract, but for some fraud, deceit, or other ground of like kind, or not at all, unless the law will raise a contract by implication, over and above, and against the express agreement of the parties themselves, and enforce it. This never has been done, and cannot be. It is true the law raises certain implied contracts, or guaranties, even under this contract, that is, that the note is genuine and not a forgery, that the parties to it are competent to contract, and the like, and if the facts are not so on these obligations the purchaser may recover. But it is beyond question, they go on the ground of failure of consideration, the thing not being what it purported to be—a fraud on the part of the seller. In this case, however, the parties were competent to contract, the note was genuine, there was no failure of title. The party failed to be able to collect it by law, because, it was, on its face, such a contract as could not be so enforced, and that fact was known to him at the purchase, and he took the paper subject to this defect, and did not require it should be guaranteed against loss on account of it by the seller. It falls clearly within the principle laid down in the above case, where the action will not lie, that is “where justice does not require it, because, say the Court, both parties acted with a full knowledge of all the facts and circumstances, and the consideration happened to fail.” It is added, “If the contract be illegal, and the parties be equally guilty, no action can be maintained.” It might be difficult for Walker to escape the effect of this principle, for if the note was void for illegality—contrary to public policy and law—it would not be far from equal participation in the wrong, to be a party to its negotiation and circulation, as well as original to make such an instrument.

The principle is correctly stated by Mr. Byles, in his work

on Bills and Notes, top p. 252. "If a bill or note, made or become payable to bearer, be delivered without endorsement, not in payment of a pre-existent debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it; and a purchase of the instrument, with all risks by the transferee. He cites Lord Kenyon as saying "that if the holder of a bill send it to market without endorsing his name on it, neither morality nor the laws of the country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill," and we add, the other party was not deceived by him. These principles must certainly apply, with even more force to the case, where the party refuses to guaranty, and transfers or sells, with an express contract that he shall not be liable. The party is thereby notified he must take the paper at his own risk, and unless there be fraud, concealment, or some other like ground, he cannot recover the consideration so paid. Of the correctness of these views, as applied to the facts of this case, we cannot doubt, and they are conclusive of this aspect of the case. As to the point suggested that the title to the note was not transferred, we need but say, that no such ground as failure of title is made in the bill, and it cannot be considered. In fact, the failure to recover the money was simply because the note was held illegal, because made before the law allowing a note for ten per cent. went into effect. We need not further consider this question.

We have carefully examined the case again, to see if it is possible to give Walker relief on any ground of fraud, or undue advantage taken of one who evidently appears to be a thriftless, and, probably, a very weak man. But after an examination, with an intimation to give relief in this direction, if it could be done, we can find no ground, based on the issues made in the bill, on which such relief can be granted in our judgment. The parties do not go on the ground of rescission for fraud, or advantage taken of a weak man. Walker does not

disaffirm the contract, and ask a rescision, but abandons that, and seeks to recover the consideration paid for the note, that is, the value of his interest in the land, or rather the amount of the note. He affirms the contract, and seeks to retain its benefits named, that is, the wagon and horses, and then to have Clark make good the note on Simrall & Hiffner, on specific charges of fraud, which are in substance, that he promised, in order to get him to take the note indorsed without recourse, to make it all right, and assured him the deed of trust would make it good anyway, and further, that Clark had taken legal advice, and knew that the note and deed of trust could not be enforced, and let him have them fraudulently with this knowledge, in order to save himself from loss.

We have again examined the testimony in the record, and we are compelled to say, he fails to make good these charges, and only raises a slight suspicion of their existence in his favor. We incline to think Clark had no suspicion at the time that the note was valid, as it was made after the law authorizing ten percent, interest had been passed, and was to fall due after it was to take effect, but before it had actually gone into operation, and the Chancellor held Walker, entitled to recover but his decree was reversed in this Court.

In fact, it is pretty clearly seen in this case, that the real contest was not made in the case by Walker, or so intended when the bill of Walker was filed, but, in fact, was but interposed by Williams, who had purchased with him, and was being pressed for the purchase money, with the hope of aiding his defence, and to delay the original proceedings.

The petition will be dismissed as to Walker, with cost.

We find that it was assumed in the former opinion that Young had not appealed in the original case, and therefore no relief could be had as to him, and the case was remanded.

We now see that a writ of error had been granted in Court, in favor of Young, so that the whole case was here. The decree will be corrected so as to give him relief as to the set-off, and the amount due both parties in the original bill will be as-

certained, and the land sold by the Clerk of this Court, unless the money is paid in sixty days.

AYRNETT, Clerk, etc, vs. EDMUNDSON.

NASHVILLE, FEBRUARY 2, 1878.

MERCHANT'S TAX. *Merchant. Trustee to Sell.* A trustee to whom goods are assigned, and who sells them from the store, but without replenishing the stock, is not a merchant, within the meaning of the law, so as to be bound to take out license or pay tax in order to sell the goods.

DEADERICK, C. J., delivered the opinion of the Court:

On February 19, 1878, Brown, a merchant engaged in selling dry goods and groceries in Pulaski, Tennessee, made an assignment of all his stock of merchandize to Edmundson, as trustee, to sell the same, and pay the proceeds on debts due from Brown. No authority was given the trustee to replenish the stock, but he was directed by the deed to sell as he could, and pay over proceeds to creditors. The trustee took possession of the goods in the house in which Brown had kept them, and has been selling them at private sale for cash, and added nothing to the stock. Ayrnett, the clerk of the county court of Giles county, insists that defendant is liable for a merchant's tax; and upon an agreed state of facts the question was submitted to the Circuit Judge, who decided in favor of defendant, and plaintiff appealed.

The transfer to Edmundson of the stock of goods charged with the trust of turning them into money to pay debts, does not make him a merchant within the meaning of the law, so as to be bound to take out license, or pay tax, before he can sell the assigned property. Trading and dealing in goods, wares, and merchandize imply not only selling, but buying to sell, as an avocation or business. This is very different from undertaking as a trustee to convert an insolvent debtor's assigned effects into money for the benefit of his creditors. A

trustee in such a case is not a merchant, or liable to be taxed as such, and it makes no difference whether the effects assigned are goods, wares and merchandize, or any other species of property. Judgment affirmed.

New York Supreme Court.

GENERAL TERM. THIRD DEPARTMENT.

(Decided May, 1878.)

HENRY W. COVELL, respondent,

VS:

ERASTUS P. HART et al., appellants.

ATTORNEYS-AGENCY.—An attorney may bind his client to pay for any services necessary to the proper preparation of a case for trial.

If he makes such a contract with a person having knowledge of his agency, and that he is acting for a well-known principal, he is not liable for the services of the person employed, unless he contracted for himself and gave the employee his personal credit or promise to pay; but the remedy of the employee is against the client for whose benefit the services were performed.

Appeal by the defendants from a judgment entered upon the verdict of a jury, and also from an order denying a motion for a new trial.

The complaint was upon a *quantum meruit*, for services alleged to have been performed by the plaintiff for the defendants. The answer simply admitted that the defendants were attorneys and counsellors at law, and that from May to September, 1874, they were partners, and denied every other matter or thing in the complaint stated.

The jury rendered a verdict for the plaintiff, against both defendants, for \$445.50.

E. F. Babcock, for appellants.

Turner, Dexter, & Van Duser, for respondent.

Held, Error. It is a general rule that when a person is known to act as a mere agent, and the principal is known, and there is no express agreement by the agent for a personal liability, and there are no circumstances from which it may properly be inferred that the credit is to be given to him, the

agent is not personally liable, though he be the person who makes the contract.

So an agent is not liable when he keeps within the limits of his authority, and discloses the name of his principal at the time of making the contract.

This principal of law is applicable to the case of attorney and client.

An attorney may bind his client to pay for any services necessary to the proper preparation of a case for trial, as by employing an accountant to examine the books of a co-partnership as an expert.

And if he makes such a contract with a person knowing of his agency, and that he is acting for a well-known principal, the person employed cannot recover for his services of the attorney, unless the latter contracted for himself, and gave the employee his personal credit or promise to pay.

In such a case the remedy of the person employed is against the client for whose benefit the services are performed.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by BOCKES, J. ; LEARNED, P. J., and OSBORN, J. concur.
[*New York Weekly Digest.*]

Recent U S. Land Decisions.

THE NEW TIMBER LAW.

An act for sale of timber land in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That surveyed public lands of the United States within the States of California, Oregon and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of \$2.50 per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands:

provided, That nothing herein contained shall defeat or impair any bona-fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July 26th, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona-fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land-office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of 60 days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said 60 days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and

that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the 12th section of the act approved May 10th, 1872, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land, may object in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

SEC. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territories, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than \$100 nor more than \$1,000, *provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until 90 days after the passage of the act.

SEC. 5 That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States, who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein such action is pending, of the sum of \$2.50 per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States.

And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved, June 3d, 1878.

Department of State, Washington, June 7th, 1878—A true copy.

SEVELLON A. BROWN.

CALIFORNIA LEGAL RECORD.

Vol. I.

JULY 13, 1878.

No. 16.

Legal Notes.

THE SUPREME COURT.

There has evidently been a studied effort in certain quarters to make it appear that the proverbial "Law's delay" is exemplified in a great catalogue of cases held undecided in the Supreme Court of this State. Quite to the contrary is the fact. Considering the amount of labor that has been devolved upon the members of the Bench, the business of that tribunal is to-day more closely "up" with the calendar than is the assigned work of any similar Court in the land.

On the first of January 1876, there was not a single case undisposed of by the Court. At this time there are only twenty five cases on the docket awaiting final decision. There are more cases decided from the Bench in California than in any other State, a fact which has been the subject of recent commendatory remarks in some of the Eastern Law Journals. It is not to be wondered at, perhaps, that in these piping times of wholesale denunciation of men and things, the minds of many ignorant people should be abused with the report that all our courts are neglectful and dilatory in the performance of their duties; but an understanding of that kind on the part of some attorneys, and other gentlemen of good general information, with respect to the condition of business before our Supreme Court, has caused us to make inquiries, which have resulted in obtaining the record truth above set forth.

APPLICANTS ADMITTED TO SUPREME COURT—The following applicants have been admitted to practice in the Supreme Court at the present term:—

W. H. G. French admitted July 9th—upon Examination.

J. B. Eames admitted on motion of E. J. Pringle, and license from Massachusetts.

James V. Coleman, on motion of T. I. Bergin and license from the District of Columbia.

F. Lee Cook, on motion of Hon. W. J. Graves, and license from Tennessee.

Joseph P. Joachimsen, on motion of H. H. Lowenthal, and license from New York.

Thos. McNulta, on July 10th—on motion of S. Rosenbaum, and license from Illinois.

There was a class of Eleven applicants examined,—among which was one woman,—whose examination appeared quite creditable,—but the result was that only one of the class, (W. H. G. French,) was successful.

APPEAL OF THE MONTGOMERY AVENUE CASE.

6141—Plover et al. vs. Mitchell, Tax Collector. Upon motion of Joseph P. Hoge and Theodore H. Hittell of counsel for petitioners, and on filing petition and affidavit for a writ of prohibition, ordered that William Mitchell, Tax Collector of the City and County of San Francisco, do desist and refrain from further proceedings in the matter of the collection of assessments or tax commonly called the Montgomery avenue assessment or tax, levied to pay the interest on bond issued to pay the damages, costs and expenses of opening and establishing the public street in said city and county, known as Montgomery avenue, and from selling any lands to pay said assessment or tax until further order of this Court, and to show cause on the 6th day of July, A. D. 1878, at 11 o'clock A. M., at the Court room of this Court, in said city and county of San Francisco, why he should not be absolutely restrained from any further proceedings in that matter and that an alternative writ of prohibition issue of this Court to said William Mitchell, as prayed for in said petition, returnable on the 16th day of July, A. D. 1878, at 11 o'clock, A. M. before this Court at the said Court room thereof

MCKINSTRY J., NILES J., CROCKETT. J.

Supreme Court Unwritten Opinions.

[No. 3992.—Decided April 26th, 1878.]

THOMAS K. HOOK. Plaintiff and Respondent.

VS

J. M. HENDERSON, Defendant and Appellant.

Appeal from Fifth District Court, San Joaquin County.

S. A. BOOKER, Judge.

Action by a bondsman against an appellant for recovery of money collected upon an appeal bond,—

STATEMENT OF THE CASE.

On August 9th. 1872 this defendant. J. M. Henderson brought action in the 5th District Court against one Enoch Sturgeon, and recovered judgment by default on Aug. 26th, for \$ 3416.

On Sept. 2nd, Enoch Sturgeon died, and Isaac G. Ham was afterward appointed administrator of his estate.

Sept. 26th, the Sheriff of San Joaquin County Thomas Cunningham, —made a levy under the said judgment, upon a lot of personal property of Sturgeon's Estate and sold, and with the proceeds paid to Henderson \$1,841.95 —on his judgment.

On January 30th, 1873, Ham, Administrator, commenced suit against the sheriff, for the recovery of the goods sold, to Sturgeon's, and obtained judgment for the restitution, or for \$ 1464, their value, and costs.

Henderson, being the real party in interest in this case, procured an appeal—taken by Cunningham, Sheriff,—to the Supreme Court, and induced Thomas K. Hook to go on his appeal Bond. The judgment was affirmed by the Supreme Court, for the sum of \$ 1464, in favor of the Sturgeon estate.

This judgment not being paid, Ham. on July 27th 1876, commenced action against Hook as bondsman, and obtained judgment for \$ 1964, and on January 2nd 1877, Hook was compelled to pay on the same \$ 963.88.

And now this action is brought on January 2nd 1877 to compel the said Henderson to repay or refund the same to said Hook his bondsman.

Defendant demurred, which was overruled; then for answer makes full denial.

Cause tried on June 26th 1877, (jury waived,) and judgment for Plaintiff for full amount claimed.

From this judgment, the Defendant appealed January 2nd 1878. Judgment now affirmed. Remittitur forthwith.

[Wallace, C. J., not having heard the argument, did not sit in this cause.]

D, S. Terry and *W. L. Dudley* Att'ys for Plaintiff and Respondent.

Byers and *Elliott*, Attorneys for Defendant and Appellant.

(No. 6034—Decided April. 29, 1878)

CITY OF STOCKTON, Plaintiff and Appellant.

VS.

E. S. HOLDEN, and Lot 2, Block 114, Defendant and Respondent.

Appeal from 5th District, Court, San Joaquin County.

STREET ASSESSMENT.—Preliminary survey and estimates not having been ordered made and filed; *held*, that a survey made without being ordered, was not competent to complete the proceedings.

STATEMENT OF THE CASE.

This case comes up on an agreed statement of Facts:—At a regular meeting of the City Council of Stockton held June 2, 1873, a resolution of intention was passed to regrade and gravel a certain portion of Hunter Street, and Monday Evening June 16, designated to hear objections at the Council Chamber, and the City Clerk, instructed to give legal notice June 3, 1873.

The notice was published on June 4th in the Stockton Independent, and daily to June 16th, and no other notice given.

On June 16th the Defendant, Holden, owner of Lot 2, Block, 114, entered a protest and remonstrance against the work being done.—The Council never passed any resolution authorizing a survey or estimate to be made for the work, but the City Surveyor, without an order or authority, made survey, and maps, and diagrams, estimates and specifications, which were

filed in the City Clerks Office, June 2,—and indorsed as approved,—and by the Council ordered filed.

The work was “ordered,” on June 16, and a Committee of three appointed to solicit and consider sealed proposals, which were advertised for in the “Stockton Independent,” daily from June 20th to July 1st inclusive.

The Contract was duly awarded to Patrick Donnelly, the work done, accepted, and estimates made by the assessor to cover cost to each lot; and were collected for, and the delinquent list returned to City Attorney.

The Defendant's lot 2. in Block 114, assessed at \$60,27, was not paid, and this suit was brought for the same. Upon trial, the findings were waived and the judgment found for defendant September, 13, 1877.

Appeal from this judgment taken by Plaintiff on March 11, 1878.—upon the points of not making and filing the preliminary survey etc; and the omission of reference to diagrams and specifications in the notice to Contractors.

Judgment and order affirmed. Remittitur forthwith.

J. A. Louttit, City Attorney—for Plaintiff and Appellant.

W. L. Dudley, Attorney for Defendant and Respondent.

[No. 5891.—Decided May 1st, 1878.]

PACIFIC MUTUAL LIFE INSURANCE CO., Plaintiffs
and Respondents,

VS:

THOS, BRADY et al., Defendants and Appellants.

Appeal from Seventh District Court, Solano County.

S. C. DENSON, Judge

STATEMENT OF THE CASE.

EJECTMENT—

Action in ejectment for two tracts of land in Solano County, and for rent and profits.

The deed under which plaintiff claims, bears date August 9, 1870, was executed by T. and J. Brady, the then owners, to

plaintiff, and was absolute upon its face, and given and received as security for \$4,000. At the same time, and as part of the same transaction, plaintiff executed and delivered to the grantors a defeasance in writing, which "declared that the said deed was executed as security for the payment of \$4,000 borrowed by T. and J. Brady, and was intended as a mortgage." This instrument was never acknowledged, proven or recorded. September 17, 1874, the \$4,000 note for the original loan, together with \$4,000 of other notes given for subsequent loans, were surrendered, and a new note for \$8,000 was made by T. and J. F. Brady to plaintiff. September 14, 1875, T. and J. F. Brady conveyed the same to P. Brady by deeds which were recorded next day. April 7, 1876, the \$8,000 note was surrendered and a new note for \$9,850, and at the same time a deed of trust to secure the same, was given by T. and J. Brady to plaintiff, for the land in suit. Defendants never paid any or the loans advanced. Defendants claimed that the deed of August 9, 1870, was a mortgage. Defendants, in their answer, offer as a cross bill, the deed of September 14, 1875, of T. and J. Brady to P. Brady, under which P. Brady, without offering to pay any of the amounts due, demands a conveyance from plaintiff of the premises. Plaintiff claims title under the deed of August 9, 1870. Judgment was rendered for plaintiff, giving them possession of the land, \$2,300 rents and profits, and costs of suit, from which judgment defendants appeal.

Judgment affirmed. Remittitur forthwith.

A. C. Freeman, R. C. Clark, and J. McKenna, attorneys for plaintiffs and respondents.

A. P. Catlin, attorney for defendants and appellants.

[No. 5894—Decided April 22, 1878.]

LOUIS H. BASCOM, Plaintiff and Appellant.

VS.

MOSES H. DAVIS—Defendant and Respondent.

Appeal from 20th District, Court, Santa Clara County.

D. BELDEN, Judge.

STATEMENT OF THE CASE.

On May 24, 1850, the Plaintiff, Bascom, selected for pre-

emption, a tract of 160 acres of U.S. Government Land in Santa Clara Co. then unsurveyed, moved on to the land in 1851, and has so occupied and resided ever since, exclusively, and improved it to the extent of \$20,000.

It was surveyed in 1866, and plat filed in Surveyor General's office on November. 7, 1866.

On January 11, 1867, the Surveyor General suspended the plat from the files to await action on a Mexican claim, which was rejected, and the plat restored to files October 10, 1868, and has since remained on file.

Plaintiff filed his proper Declaratory statement within 3 months of the filing of the plat in Surveyor General's office.

The defendant Davis, claimed to have bought a share or interest in same lands in 1858, of C. Galindo Jr. assignee of Julian C. Galindo Sr. for \$1000—under a pretended purchase of a Mexican Priest, but never any paper of title. At request of defendant, the surveyor General made an amended plat of a part of the lands (40 acres)—ie, Lot 2, of 10 and 30—100ths acres and Lot 3, of 29, and 70—100 acres, and on January 12, 1869 defendant filed application for Lot 3, (with other lands), under act of July 23, 1866.

In 1871. Plaintiff made full proof for land, and the Register and Receiver awarded him all his claim except the Lot, 3, and that they awarded to defendant.

Plaintiff appealed to the Commissioner, and on December, 3, 1872 the commissioner re-awarded him the whole. Defendant then appealed to the Secretary of the Interior, and he decided on September 17, 1873. that Lot 3. should go to defendant on a question of law. Hence plaintiff now brings bill in equity to compel Davis to convey land to him.

This bill was dismissed October 26, 1877—and judgment that defendant keep the land. Plaintiff appealed from this judgment November 5, 1877—and the case comes up on the findings—no motion for new trial having been made.

Judgment Affirmed—Wallace C. J. expressed no opinion.

Morre, Laine and *Leib*, Attorneys for plaintiff and appellant.

Houghton and *Reynolds*, Attorneys for defendant and respondent.

Recent U. S. Land Decisions.**CORRIGAN V. RYAN.**

No specific act of settlement, after restoration of the land, is required of a settler whose every day life can be considered a compliance with the law. But such settler cannot embrace in his claim land not in his possession on which are the improvements of another who, like himself, has settled without the protection of law.

A homestead entry made on the day of the restoration, of a tract not in the possession of the pre-emptor is a legal appropriation of the land as soon as it is subject to entry.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C. April 14, 1877.

SIR:—I have considered the case of Matthew Corrigan vs. Michael Ryan involving the right to the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, of Section 21, Township 2 South, range 11 East, M. D. M., Stockton, California, on appeal from your decision of July 6, 1876, awarding the tract to Ryan.

The tract was restored to public entry September 4, 1874. Corrigan filed declaratory statement for the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of said section 21, on that day, alleging settlement in 1872, and Ryan made homestead entry the same day for the tract in dispute.

It appears that Corrigan entered upon the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, and cultivated a portion of the same in 1872, and has resided thereon since that date. From the evidence it appears that he did not have possession of the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, nor did he cultivate any portion of the same until after Mr. Ryan made homestead entry. Ryan settled upon the land during the month of August, 1874. He can claim no right prior to date of entry, and the question arises, is his homestead right defeated by the pre-emption claim of Corrigan?

No specific act of settlement, after restoration of the land, is required on the part of a settler, whose every-day life can be considered a compliance with the law; but can it be held that a right thus initiated, attaches to more land than he has in actual possession, and by simply claiming a contiguous tract as a part of his pre-emption, he can appropriate to himself the improvements of another, who like himself has settled with-

out the protection of the law? I think not. I see nothing in the law, or the decisions of the Department, to justify such a conclusion, and it certainly can not be defended on any ground of reason or justice. For two years prior to restoration the tract in dispute had been in the possession of other parties. It is not shown that Corrigan during that time made any effort to reduce the same to his possession.

Admitting the correctness of the doctrine that the right of pre-emption attaches *eo instanti*, it only operates, so far as the claimant is concerned, on the tract in his possession, and not on land in the possession of another, and your office in such a case is justified in holding that a homestead entry made on the day of the restoration, for a tract not in the actual possession of the pre-emption claimant, but in the possession of the homestead claimant, is a legal appropriation of the land as soon as it is subject to entry. Had Corrigan been in the actual possession of the land, and been forcibly ejected by Ryan prior to its restoration, another and different element would enter into the case, but as before stated, the tract had not been under his control, and Ryan had obtained peaceable possession of the same.

There is nothing, in my opinion, in these views conflicting with those expressed in the cases of Peterson v Kitchen (*Copp's Land Owner* for March, 1876,) and Timmons v Gleason, (*Ib.* for August, 1876,) but they are rather in accord with those expressed by my predecessor in the case of Porter v Johnson, (*Ib.* for June, 1876.)

Your decision is affirmed, and the papers transmitted with your letter of December 29, 1876, are herewith returned.

Very respectfully,

C. SCHURZ. Secretary,

To the Commissioner of General Land Office.

New York Supreme Court

GENERAL TERM. FOURTH DEPARTMENT.

(Decided April, 1878.)

ADDISON STEARNS, exec'r, etc., Respondent,

vs.

LORENZO D. GAGE, Appellant,

FRAUDULENT PURCHASER.—When a person is about to perform an act by which he has reason to believe the rights of a third party may be affected, an inquiry into the facts is a moral duty. Hence, he purchases at his peril when he omits to inquire, and is then chargeable with all the facts which by inquiry, he might have ascertained.

Appeal from judgment on report of referee in favor of plaintiff.

The plaintiff recovered a judgment against Marvin Gage. Execution thereon was returned unsatisfied, and this action was then commenced to set aside a conveyance of the farm on which the judgment debtor resided to his son, Franklin B. Gage, as being in fraud of the creditors of the said Marvin. After the recovery of the judgment against Marvin, his son Franklin conveyed the premises in question to his uncle, Lorenzo D. Gage, who, it is alleged, had notice of the fraud in the conveyance from Marvin to his son Franklin.

The issues were referred to a referee who found in favor of the plaintiff.

The facts relied on to establish the fraud are substantially as follows:

Franklin had lived with his father, Marvin, and worked for him several years after he came of age, without any agreement as to wages. For a year before the sale to Franklin, he carried on the farm on shares, and his father had his share, of the crops. The father was insolvent at the time, and his creditors were pressing him for pay or security. He owned the farm conveyed to Franklin, and two other farms in the neighborhood, all of which were encumbered by judgments and mortgages. These were conveyed to his three sons, who were men of little means, and part of the price was paid by the purchas-

ers' notes, and the farm sold to Franklin was sold for less than it was fairly worth; that part of the consideration therefor was the written agreement of Franklin to support his father, furnish him a horse and carriage, pay his funeral expenses and furnish him medical attendance, and also to pay his father the further sum of \$500 if he should demand it.

In arriving at the amount to be paid by Franklin to his father \$1,500 was claimed and allowed to the former for his services after he came of age and for his share of the crops for the preceding year. In fixing this amount, no account was exhibited on either side.

Franklin, at this time, knew his father was insolvent and pressed by his creditors. On one occasion he told one of the creditors that the property would be changed, and he would not be torn to pieces.

The referee finds that Lorenzo D. Gage, the last grantee of the premises, when he bought the farm of Franklin, had lived near Marvin twenty or thirty years, was surety for him for some of his debts; that in the summer before the conveyance to Franklin, he (Lorenzo) knew Marvin was pressed by his creditors, but supposed him to be good; that he knew of the sale to Franklin and the consideration therefor, and that Marvin was insolvent at that time.

Comstock & Bennett, for applt.

W. H. Smith, for respt.

Held, That referee was right in finding, as a conclusion of law, that Lorenzo Gage had sufficient information in regard to fraudulent dealings between Marvin and Franklin, Gage to put him on inquiry, and if he had inquired, would have found that the conveyance of the farm to Franklin was fraudulent and void as to creditors. Kerr on fraud, 236, 238-9; 4 Abb. Dig., 585, §§ 39, 40, 41, and 42.

Held further, That the provision for the father's support making \$ 590 of the purchase money payable if the father should ultimately require it, and the allowance of \$ 1,500 for the son's services, when there was no legal liability therefor,

are convincing and conclusive evidences of fraud.

Judgment affirmed, with costs.

Opinion by *Mullin P. J. Smith* and *Talcott, J. J.*, concurring

(Decided March 8, 1878.)

N. Y. SUPREME COURT. GENERAL TERM. FIRST. DEPT.

WM. HENRETTY, Appellant.

VS:

CORNELIUS MCGUIRE, Respondent.

CONTRACT—A party contracting with another cannot be compelled to accept the performance of the contract at a third party's hands.

A party has the legal right to choose with whom he will contract, and is entitled to just what he contracted for.

Appeal from judgment dismissing the complaint.

On the 4th of December, 1874, plaintiff went to Staten Island to see a peice of real estate with a view to purchasing the same. He met, living upon the premises, the defendant, with whom he opened communications for its purchase, which resulted in the two executing a contract in their respective names for the sale of the property, and the deed was to be delivered December 15. The plaintiff thereafter, and before December 7, paid \$1,000 on account of the purchase price, for which the defendant gave a writing, acknowledging the receipt of the same, "upon the warranty that my title is clear and good to the said property."

At this time defendant was not the owner of the property, having previously transferred it to one Patrick Reilly. On the 8th of December, defendant called with Reilly upon plaintiff's attorneys, and stated that Reilly owned the property, and that he would give the deed; and a contract for the sale of the same property was thereupon drawn up and signed by Reilly, in which he "ratifies and confirms the acts and contract of his agent, Cornelius McGuire, made with said Henretty, the 4th day of December, 1874, and promises and covenants to fulfill the same on his part."

It further provided that if it was accepted by Henretty, it should be subject to the terms of payment and conditions of the contract between McGuire and Henretty.

Plaintiff's attorneys had this recorded on the 12th of December, and no objection seems to have been made by plaintiff until the 15th, when he refused to accept a deed of the property executed by Reilly and his wife, and demanded back the \$1,000 paid to defendant. And on the 17th commenced this action, alleging that defendant falsely, deceitfully, and fraudulently represented himself to be the owner of the land in question, and that plaintiff was thereby induced to enter into the contract of sale and purchase, and to pay to him \$1,000. It was shown upon the trial that defendant had stated that he was the owner of the property.

The Court on the trial dismissed the complaint.

Robert L. Fowler, for Appellants

W. H. Newman, for Respondent.

Held, That the accepting and recording of Reilly's contract by plaintiff's attorney was not a waiver of the objection that defendant had no title, since plaintiff had no knowledge of the execution or recording of that instrument, and by its terms it was made subject to his approval. As soon as he learned that defendant was not the owner he refused to proceed further and promptly demanded back the money which he had advanced.

Plaintiff was not compelled to accept the deed from Reilly, as a performance of the agreement. This is not a case where a party innocently contracts to sell lands, under a mistaken belief that he is the owner.

It is not an answer that Reilly was willing and ready to convey the same land, and that defendant did, within the time, tender Reilly's deed.

Plaintiff did not contract with Reilly, or for his title. He was entitled to just what he contracted for, and defendant, not being able to perform his agreement, should have restored, on demand, the plaintiff's money.

The inquiry is not whether the title of Reilly was perfect, nor whether the plaintiff would probably have been as well off by accepting it.

A party has the legal right to choose with whom he will

contract. and he cannot be turned over to another party under circumstances such as are developed in this case.

Judgment reversed.

Opinion by *Ingalls. J.*; *Brady J.*, concurring.

[Decided April 1878.]

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

SARAH J. HANNAHS, Executrix, etc., Respondent,

VS.

ALONZO CHURCH, Appellant.

AGENCY—RATIFICATION—A ratification of the unauthorized acts of an agent can be implied as against the principal only when he acts with a full knowledge of all the facts whereby he is sought to be charged.

Appeal from a judgment of the Jefferson County Court, in favor of the plaintiff.

The defendant owned a hotel, which he rented to one Eddy.

It was agreed that defendant should erect an addition to the hotel, he to furnish the material for the building, and Eddy was to pay for the labor. Eddy ordered paint of plaintiff's agent, and plaintiff now sues defendant for the value of the paint upon the ground that he authorized Eddy to purchase it. The defense is that defendant never authorized the purchase.

The Court charged the jury in substance that they might find a ratification of the purchase by defendant from his being in the building and seeing painting done, and preparations for further painting. Defendant's counsel excepted.

D. Bearup, for respondent.

W. F. Ford, for appellant.

Held, That unless defendant knew when he was in the building, and saw the painting done, that the material was delivered by plaintiff, an important element of ratification was not established.

The defendant's counsel asked the Court to charge the jury that defendant could not be held to a perfect ratification unless defendant had some intimation that the goods were purchased on his account.

The Court refused to so charge.

Held, Error. The Court should have charged as requested Judgment reversed, and new trial granted.

Opinion by *Mullin, P. J.*; *Talcott* and *Smith, JJ.*, concur., on the ground of error in charge, and refusal to charge as requested.

[Decided April 16, 1878.]

N. Y. COURT OF APPEALS.

LYNCH, Respondent

vs.

McNALLY, Appellant.

ANIMALS—An action for injuries sustained by the bite of a vicious dog is based upon the keeping of the dog with the knowledge of his propensities. Contributory negligence, in its legal acceptance, is not a defence; to constitute a defence in such an action, it must be established that the person injured did some act from which it may be affirmed that he brought the injury upon himself.

Plaintiff, who was not shown to have had knowledge of the vicious propensities of the dog, which was loose, offered him a peice of candy, when he sprang upon and bit her. *Held*, That this could not be called negligence.

This was an action to recover damages for injuries sustained by plaintiff from the bite of a dog owned by defendant. There was evidence that the dog was vicious and that defendant knew it.

Malcom Campbell, for Appellant.

F. J. Lupignac, for Respondent.

Held, That defendant was liable; that such an action is based upon the keeping of the dog with knowledge of his propensities: that if negligence is an element of the cause of action at all, it is not so in the ordinary sense of that term, but consists in the act of keeping the dog with knowledge of his disposition; that contributory negligence, as that term is understood in law, is not a defence; that to constitute a defence to such an action it must be established that the person injured did some act from which it may be affirmed that he brought the injury upon himself; so if a person knowing the vicious propensities of a dog, should wantonly or wilfully do an act to induce the dog to bite, or should unnecessarily and

voluntarily put himself in the way of the dog, knowing the probable consequences, the same principle would apply.

It appeared that the dog was loose, and there was no evidence that plaintiff had knowledge of his vicious propensities. She offered him a peice of candy, when he sprang at her and bit her.

Held, That this could not be called negligence on the part of plaintiff; that it was not an act from which any bad consequences would naturally follow, as every dog at large is presumed to be a peaceful dog.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Church, Ch. J.* All concur except *Allen, J.* absent.

HAMILTON COUNTY DISTRICT COURT.

J. G. MURDOCK & Co.

vs.

THE NATIONAL TUBE WORKS CO.

Agents can not Hypothecate or Apply Property of their Principals to the Payment of their own Debts.

This was a petition in error to reverse a judgment of the Common Pleas, where the suit was brought by the Tube Works Company to recover a balance of an account for tube alleged to have been sold to J.G. Murdock & Co. The defense was that Murdock & Co never had any dealings with the company, but purchased of the Redfield, Bowen & Walworth Company, in Chicago, who had been fully paid; that Murdock & Co. ordered the tubes from Redfield & Co. to secure an account they had against the Company, and there being a surplus, they sent their check to that company to pay the difference. It appeared that on the receipt of the check Redfield, Bowen & Co. had made an assignment. It was alleged that the latter company were agents of the National Tube company.

Judge Cox, in announcing the opinion, said it was well settled, that a party who holds property as agent for another, and

simply acts as agent, can not hypothecate it or apply it to the payment of his own debt. The testimony shows that Redfield, Bowen & Co. were in debt to Murdock & Co., and were agents of the National Tube Company, that the pipe they sold to Murdock belonged to the National Tube Company, and they had no right to turn it over to the payment of their own debt. Murdock & Co. claim that they were not aware the property belonged to the National Tube Company, but the bill-heads on which certain accounts were furnished set out that fact. Murdock & Company say that though it was a custom of parties to represent themselves as agents, the transaction in question was their individual transaction, and that when the bill was sent to them they did not observe that these parties were acting as agents, and otherwise that they would not have dealt with them. But whether or not Murdock & Company had notice that the property belonged to the National Tube Company, the parties from whom they obtained it could not transfer it in payment of their own debt.

—Judgment affirmed.

HAMILTON CO. DISTRICT COURT.

CHARLES JACOB, JR.,

v.

THE FIRST NATIONAL BANK OF CINCINNATI.

ASSIGNMENT OF LIFE INSURANCE POLICY—*Held*, that the State Law does not forbid the Sale and assignment of a valid Life Insurance Policy,—already in existence—to an assignee who has no interest in the Life assured, when the assignment is made as an honest and *bona fide* business transaction, and is permitted or not prohibited by the Policy.

It appeared that on the 26th of December, 1868, one Edward T. Ross got his life insured for \$2,000, payable to his wife at his decease. His wife was a second wife. He had children by his former wife, but none by her. She died before him,—August 21, 1871. He was then in infirm health and short of means. He did not pay one premium promptly. The company, however, accepted payment afterward and issued the policy anew, payable to his legal representatives. On the

2d of January, 1872, he assigned the policy to the defendant, and received the defendant's note for \$125, which was paid April 10, 1872. The surrender value of the policy at the time of the assignment was \$118. The defendant was Ross' brother-in-law. After the assignment which was assented to by the insurers, the defendant paid five quarterly premiums of \$25 each. Ross died March 24, 1873. The defendant collected on the policy \$2,121.20. The plaintiff, who was administrator on Ross' estate, brought this action to recover that amount, less the amount of the note for \$125, and the five quarterly premiums with interest.

DURFEE, C. J.—The plaintiff claims that the assignment was made as security for a loan and not as an absolute sale. Testimony was submitted on this point. We think the assignment was intended to be an absolute sale.

The plaintiff contends that, if the assignment was an absolute sale, it was void as against public policy, and that he is, therefore, entitled to recover the money received on it, less the payments aforesaid, as money received to his use. The defendant claims that the assignment, though absolute, is valid, and that he is entitled to keep the money as his own.

Upon the question thus raised there is a conflict of decision. In Massachusetts and Indiana it has been decided that a life policy is not transferable outright to a person who has no interest in the life insured: *Stevens, administrator, v Warren*, 101 Mass., 564, *Franklin Life Insurance Co. v Hazzard*, 41 Ind., 116. A similar decision (but in a case having peculiar circumstances) has been made by the Supreme Court of the United States, *Cammack v Lewis*, 15 Wall., 643. The reason given is that it is unlawful for a person to procure insurance for himself on a life in which he has no interest; for otherwise the law could always easily be circumvented by first having a person get his own life insured and then taking an assignment of the policy. And it is also argued that the gambling or wagering element is the same and the temptation to shorten the life insured is the same in the one case as in the other.

But, on the other hand it has been decided in England that

such an assignment is valid: *Ashley v. Ashley*, 3 Sim., 149 cited without disapproval by Chancellor Kent, in 3 Kent's Com., 369, note. The reason given is that such an assignment is not within the prohibition of the English statute, 14 Geo., III. cap., 48, and that the policy being valid in its inception is like any other valid chose in action, assignable at the will of the holder, whether the assignee has an interest in the life insured or not. This view has been repeatedly affirmed in New York: *St. John v. American Mutual Life Ins. Co.*, 2 Duer, 419; also in 13 N. Y., 31, on appeal; *Valton v. National Fund Life Assurance Co.*, 20 N. Y., 32; and see *Cunningham et al v. Smith's Adm'r*, 70 Penn. St., 450.

We think the assignment was valid. A life policy is a chose in action, a species of property, which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if permitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful; but it does not follow that such an assignment is not to be permitted at all, because, if permitted, it may be abused. Let the abuse, not the *bona fide* use, be condemned and defeated. See *Shilling. Adm'r v. Accidental Death Ins. Co.*, 2 H. & N., 42. It is not claimed that the parties to the assignment here in question had any design to circumvent or evade the law. Perhaps *Cammack v. Lewis*, 15 Wall., 643, *supra*, may be found to be a case of that kind.

Again, the assignment is said to be a gambling transaction, a mere bet or wager upon the chances of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy as any other legal chose in action may be transferred, from the holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is when a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account.

But finally, it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation. It has been decided, too, that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though the holder then ceases to be interested in the continuance of the life, and is thereafter exposed to the same temptation, which is to beset the assignee without interest to bring it to an end: *Dalby v India & London Life Assurance Co.*, 15 C. B., 365; *Law v London Indisputable Life Policy Co.*, 1 Kay & J., 223; *Rawls v American Life Insurance Co.*, 3 Am. Law Reg. N. S., 167, S. C., 27 N. Y., 282; *Campbell v N. E. Mutual Life Insurance Co.*, 98 Mass., 381; *Providence Life Insurance & Invest. Co. v Baum*, 29 Ind., 236.

If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to avoid the assignment to an assignee without interest? The truth is, it is one thing to say that a man may take insurance upon the life of another for no purpose, except as a speculation or bet on his chance of life, and may repeat the act *ab libitum*, and quite another thing to say that he may purchase the policy, as a matter of business, after it has been once duly issued under the sanction of the law, and is, therefore, an existing chose in action or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality and no imminent peril to human life. We should have strong reasons before we hold that a man shall not dispose of his own. Courts of justice, while they uphold the great and universally recognized interests of society, ought nevertheless to be cautious about making their own notions of public policy, the criterion of legality, lest under the semblance of declaring the law, they, in fact, usurp the function of legislation: *Hilton v Eckersley*, 6 El. & B., 47, 64.

We therefore, decide that, whatever the law of this State may be in regard to procuring insurance upon the life of another without any interest in the life insured it does not forbid the sale and assignment of a valid policy, which is already in existence, to an assignee without interest in the life insured, when the assignment is permitted or not prohibited by the policy and is made not as a contrivance to circumvent the law, but as an honest and *bona fide* business transaction.

Judgment for defendant for his costs.

Book Notice and Review.

THE SEPARATE PROPERTY OF MARRIED WOMEN—A Treatise on,—and under the Recent Enabling Statutes. By J. C. Wells, Author of "Questions of Law and Fact," "Instructions to Juries, and Bills of Exception," etc, etc.

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SOUTHERN LAW REVIEW—G. I. Jones and Co. St. Louis, Mo.—The June-July No.(1878.) contains 176 pages, and constitutes No. 2.of Vol 4 New Series.—Contents,—(I) A Chapter of Blunderings on and off the Bench by Joel P. Bishop:—(II) Principles that should govern in the Framing of Tax Laws, by Thos N. Cooley L. L. D.:—(III) The Legal Nature of the Rolling Stock of Railroads, by Leonard A. Jones. (IV) Disputed Questions of Criminal Law by Francis Wharton L. L. D.:—(V) Book Reviews:—(VI) Notes:(VII.) Digest of Recent Cases reported in American Law Periodicals:— And, quite a List of Attorneys. Is Published Bi-Monthly—terms \$5. per Annum. Single Nos. (2 months) \$1.00.

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THE LOWELL ADVERTISER.—We have before us this week, the *Lowell Advertiser*, No. 4, Vol. 1, which seems to be a live business paper of an important firm of job printers, F. W. Goove & Co. It also contains many short sketches which sparkle with wit and humor.

NEW DECISIONS—Up to this date our Supreme Court has rendered no decisions of cases of this new term, but we are in daily expectation of them, and shall promptly and fully report them *all*, soon as rendered' as our readers have so well learned it is the *way* of the *Record* to do,

Meantime, there are still remaning several more of those Unwritten opinions of the last term, which we are reporting as fast as practicable, having now published 53 more California Supreme Court decisions than have appeared in the "*Law Journal*"—Facts are stubborn things.

CALIFORNIA LEGAL RECORD.

Vol. I.

JULY 27, 1878.

No. 17.

Legal Notes.

AN IMPORTANT WILL CASE.—On the 10th of the past month one Edward Mulherrin died in Sacramento leaving an estate of upwards of \$10,000, consisting of money in the bank. Several months prior thereto, Mulherrin executed a will appointing Frank Schuler executor. After the death Schuler, by his attorney, W. A. Anderson, filed the will with petition for the probate and issuance of letters testamentary. Subsequently the Public Administrator and several creditors, by their attorney, J. N. Young, petitioned for the contest of the will upon the grounds of insanity of the testator. To these last applications demurrers were interposed to the effect that the Public Administrator nor creditors did not possess the legal capacity to institute a contest—not being, in the purview of the law, parties in interest. This is the first time the Court has been called upon to determine this question. The case was concluded on the 11th in the Probate Court, and after full arguments pro and con. Judge Clark rendered his opinion that the Public Administrator nor creditors could institute a contest; that under the statute these parties had no standing in Court, and thus sustained the demurrers and dismissed the application. Another interesting question arose during the examination of this case—as to what extent the excessive use of intoxicating liquors incapacitated the testator from executing a valid will? The Court held that neither intoxication, nor the prior use of stimulus, even to the extent of delirium a few days prior to signing the will, incapacitates the testator, if it appears that there was no fraud and that the testator knew what he was doing. These taken in connection with the will itself, which appears natural and reasonable, entitles it to be admitted to probate. It was so ordered.

CALIFORNIA LAND CASE.—WASHINGTON; July 26th—The Secretary of the Interior has affirmed the decision of the Commissioner of the General Land Office in the case of Alexander Grant Dallas vs Carl E. White and others, involving title to the Albion grant, in township 16 north, range 66 west, and township 16 north, range 17 west. Mendocino county, California, with two exceptions. The claim of D. N. Vickery is awarded to Dallas, and Thomas Boyle is awarded the tract claimed by him. The Secretary recently reversed the decision of the Commissioner of the General Land Office in the case of T. Wallace More vs S. A. Guiberson and others, involving lands in the Sespe Ranch, Santa Barbara county, California. The Commissioner of the General Land Office today transmitted to the Surveyor-General for delivery, the patent for the Rancho Cucua, or El Potrero, situated in San Diego county, California, and confirmed to Maria Juana de Los Angeles. The survey contains 2,174.25 acres.

HASTINGS COLLEGE OF LAW.—Professor J. N. Pomeroy of Rochestea, N. Y. has been selected to lecture before the students of Hastings' Law College. Fifty applicants for admission to the College have already been registered. The course of study is to extend through three years, and the classes will be formed accordingly. The preliminary examination of applicants will be held August 8th.

ADMITTED TO PRACTICE.—On July 18th, Jno. D. Whaling on motion of H. C. Firebaugh, and a license from the Supreme Court of Illinois.—July 24th, Walker E. Graves, on motion of Geo. E. Harphrue, and license from the Supreme Court of Kentucky.

AN IMPORTANT CASE.—A trial which is attracting considerable attention, is now progressing in the District Court for Sutter county. James H. Keyes, the plaintiff, is a farmer and owner of about one thousand acres of land on Bear river, six miles above the mouth of the stream. The defendant is the Little York Washing and Water Company, operating at hydraulic mining near the town of Little York, in Nevada county. There is a fine array of counsel on each side, including one of the ablest lawyers in Sacramento for the plaintiff, and perhaps the very ablest in this city for the defendant. It is a civil suit for damages resulting to plaintiff's land from the filling up of Bear river, and the spoliation of his farm by the discharge of silt, gravel and other debris from the defendant's mines. These discharges have been going on for over twenty years, and in the course of that time the natural bed of the river has been filled up to the extent of twenty feet or more; so that in the seasons of average rainfall, the water overflows banks, inundating the land and covering it in places with an extremely sterile sandy sediment, and destroying all capacity for the production of any valuable crop. The defendants substantially admit all this, but they set up the plea against damages, that by the laws of the United States, and of the State of California, they have the right to discharge the debris from their mines in the manner complained of, and that if damage results to any land below them in the foothills or valleys, or to any other interest to that of farming or ranching, it is from no fault of theirs, and they are not in law responsible for it.

A LEGAL DIFFICULTY.—Forty members of the Salt Lake Bar, have complained of the incompetency of Chief Justice Schaeffer, and recently had a conference with special agent Chase, who is investigating the Federal officers. The attorneys in their petition to the President for the removal of the Judge, charged incompetency, and represented that litigants have no confidence in the Court. It is the impression that the Judge will have trouble to save his official head, and that Governor Emery will also have to go.

Supreme Court of California.

[July Term, 1878.]

[No. 5191.]

[Decided July 16th, 1878.]

MATTHEW KELLER, Plaintiff and Respondent.

vs.

CARRIE LEWIS, et al, Defendants and Appellants.

Appeal from Seventeenth District Court, Los Angeles County.

Y. SUPELVEDA, Judge.

Action brought to declare a contract for the purchase of land,—forfeited for non-payment of balance of purchase money.

STATEMENT OF FACTS.

On the twenty-fifth day of March, 1872, the plaintiff made an agreement to sell to defendant, whose husband, residing in Cleveland, Ohio, was unknown to him—a certain tract of land in Los Angeles county, known as Rancho "To-bango Malibu," at which time defendant paid on account of such purchase, the sum of \$600; and on the second of April, 1875, the additional sum of \$11,066.66,—defendants, however, failing to pay the remainder of the purchase money, \$23,333.33, when the same became due, June twenty-sixth, 1872. Plaintiff, alleges the belief, that said contract was fully known to defendant, G. F. Lewis, the husband of said Carrie Lewis, and ratified by him; and further, that the monies paid, were furnished by said G. F. Lewis, to his wife as her own separate property.

Plaintiff alleges, that in the said agreement, it was provided that if said defendants failed to comply with its terms, all her rights to said property were to be forfeited, and the plaintiff released from the obligations of the same—and further, that said defendant with her son, immediately upon the execution of the contract, took possession of—and resided upon said premises; residing upon the same, for the space of sixty days, after which time they returned to Cleveland, Ohio, failing to hold any further communication with plaintiff in relation to said lands, or payment for the same,—although still holding in her possession said contract, the unsatisfied record of which is in the office of the County Recorder, remained as a cloud upon plaintiff's title to said lands, by reason of which he was unable to sell the same,—wherefore he asked judgment of forfeiture, according to the terms of said contract.

Defendant's demurrer to the complaint in this case on the ground of insufficiency—being over-ruled,—the parties set up a denial, that said plaintiff was ever served of more than one-undivided third of said land; alleging further, that the sole connection of said Carrie S. Lewis with said transactions, was as

the agent of the defendant G. F. Lewis, who was known to plaintiff as the real purchaser.

It is alleged in addition, that defendant, Carrie S. Lewis, was authorized by her husband to purchase a ranch in California, provided the title was undisputed, of which fact plaintiff was fully aware. Defendants admit the payment of the amounts stated, but deny that the remainder of the purchase money has under the terms of the contract ever become due, as payable to plaintiff—by reason of his failure to comply with same, further denial is made of the taking petition of said lands, further than a small portion of the same adverse claimants being in possession of the other portions of said rancho. The return to Ohio is admitted, but an abandonment of said purchase, or of this contract for the same is denied. They allege repeated communications with plaintiff, evincing a willingness to pay the money and take the property, on the plaintiff's compliance with the terms of the contract between said parties to the same. Upon the trial of the case a jury being waived, the Court found that the title to the land was in the plaintiff, and that in the negotiation of the same, no fraud or concealment was used—that the value of the same had largely enhanced since the last payment agreed upon became due, which defendants never offered to make, or excuse, or account for their laches in the premises. Judgment was accordingly entered up, from which defendants appealed.

Glasgowell, Chapman & Smith, attorneys for plaintiff and respondent.
Bruseon & Easman, attorneys for defendants and appellants.

OPINION BY THE COURT.

The decree declares the money already paid on the contract—and all right of defendants in and to the lands,—forfeited.

It is a *universal rule* in equity never to enforce either a penalty or forfeiture, (2 *Story's Eq.* 1,319, and cases cited.) On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law. In the view of a court of equity, in cases like the present, the legal title is retained by the vendor as security for the balance of the purchase money, and if the vendor obtains his money and interest, he gets all he expected when he entered into the contract. True, he is not bound to wait indefinitely after the failure of the purchaser to comply with the terms of his agreement. If the payments are not made when due, he may, if out of possession, bring his ejectment, and recover the possession; but if he comes into *equity* for relief, his better remedy, in case of persistent default on the part of the vendee, is to institute proceedings to foreclose the right of the vendee to purchase—the decree usually giving

the latter a definite time within which to perform. (*Hansborough vs Peck*, 5 *Wallace*, 506).

Under the circumstances of this case, as presented by the pleadings and evidence, the decree of the District Court should have fixed a day within which the defendants should pay the balance due upon the contract, and costs, etc., or be forever foreclosed of all right or interest in the lands or to a conveyance thereof.

MCKINSTRY, J.

We concur:

CROCKETT, J.

RHODES, J.

WALLACE, C. J.

[No 5423.]

[No. 5423, Decided July, 16th, 1878.]

MONTEREY and SALINAS VALLEY R. R. COMPANY
Plaintiff and Appellant

VS

THOMAS HILDRETH. Defendant and Respondent.

Appeal from the Seventeenth District Court, Santa Clara Co.

BELDEN, Judge.

ACTION—Brought by a Railroad Corporation to compel payment of \$25,000 capital stock and assessments, by a subscriber to the agreements creating the same.

STATEMENT OF FACTS.

The plaintiff and appellant in this case brought its action to recover \$25,000 with interest from the dates of the levies of assessments upon its capital stock.

The basis of this action is an agreement by which defendant and others, for the purpose of contracting a railroad between the points named in the title, contracted to pay the several amounts subscribed by them, in gold coin of the United States.

The articles of incorporation of said Railroad Company show that the defendant signed the same, and became for the first year one of its directors,—and in diverse other acts before the commencement of this action ratified and acknowledged such corporation.

The plaintiff having built said road, which it now runs and operates, being unable to meet the liabilities of the same,—at various times assessments covering its capital stock—were levied by the Board of Directors of which defendant was a member,—all of which as well as any portion of his original subscriptions he refused to pay.

The defendant sets out with the established proposition that an assessment levied upon the stock of a company can only be collected from those who own the same,—and further alleges that the recognition of plaintiff as the corporation named in the agreement, does not constitute him a stock-holder. In the case of *Buffalo, etc., vs Dudley 14, N. Y.*, it is held that if a subscription does not make the subscriber a corporator, it does not place him in a position where he can compel the corporation to give him stock, does not become a stock-holder. It is further claimed that as the Code existed when the assessments were levied, a corporation had no power to levy assessments until the whole of the capital stock was subscribed,—and that in this instance the capital stock was fixed at \$300,000, divided into 3,000 shares of \$100 each. Only 250 shares were subscribed to the articles of incorporation. No further subscription to the stock appearing to having been made, the whole capital stock was not then subscribed at the time the assessments were levied, the same became void for want of power. This case having been submitted without the intervention of a jury, the Court on October 21st, 1878, adjudged that “the plaintiff cannot recover against defendant as a stock-holder for assessments.”

Wm. Matthews attorney, for plaintiff and appellant.

D. M. Delmas, attorney for defendant and respondent.

OPINION BY THE COURT.

The right of the parties to this action must be determined by reference to certain provisions of the Civil Code, as the same read when the corporation, plaintiff, was formed.

Section 293 of that Code provided: “Each intended corporation named in section 261, before filing *articles of incorporation*, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to-wit:

1. One thousand dollars for each mile of railroads.”

Section 290 of the same Code requires that the “Articles of incorporation” shall set forth, amongst other matter, “If there is a capital stock, *the amount actually subscribed, and by whom.*”

The Code prescribes no particular form for the subscription paper from which it may appear that one thousand dollars a mile was subscribed toward the “intended” railroad.

But it is plain that the amounts subscribed, and by whom, must be fully set forth in the articles of incorporation. Those who sign and file the articles, and thus bring the corporation into existence, act for the real subscribers. If the statement contained in the articles, as to the amount subscribed, and by

whom, is incorrect, one of two results must follow : either the attempt to give existence to the corporation is abortive, or the corporation which comes into life is estopped from claiming that any other person than those named as subscribers, became a member, when the articles were filed, or that any other person therein named was a subscriber for a larger sum than that mentioned in the articles. In either event, this action cannot be maintained.

Whether one not named as subscriber in the articles of incorporation, but who had in fact previously subscribed, could have the articles declared null, or, on the other hand, claim the right to be admitted as an associate member, is not an immediate question. The requirement of the Code is absolute and peremptory. The articles must set forth the amount subscribed and by whom. The instrument from which the corporation derives its being, must be held to limit the power of the corporation, so that it can bind as stockholders as of the date of its filing only those named in the articles and to the amounts therein mentioned.

Judgment affirmed.

MCKINSTRY, J.

We concur :

CROCKETT, J.

RHODES, J.

WALLACE C. J.

[No. 10,352.]

(Decided, July 22, 1878.)

PEOPLE vs BELL.

Appeal from Thirteenth District Court, Merced County,

J. B. CAMPBELL, Judge.

MURDER.—

STATEMENT OF FACTS.

The defendant and appellant, Geo. T. Bell, was indicted by the Grand Jury of Merced county, on the ninth of March, 1878—jointly with Henry Bell, for the murder of Silas McSwain, committed January 2nd,

1878. Upon the trial of this case, the jury found the defendant George T. Bell, guilty of manslaughter, when a motion of acquittal was made by his counsel, on the ground that by said verdict, defendant was not found guilty of any offense,—and that no facts were found from which the Court could, as a matter of law, adjudge that he was guilty of any offense,—which was denied, as was also the motion for a new trial, on the ground that the Court erred in the decisions of questions of law,—and that the verdict in the case was contrary to law and evidence. On appeal the ruling of the Court was reversed, and cause remanded for a new trial.

B. F. King, District Attorney, Merced County, for the People.

Frank H. Farrar and Terry, McKenney and Terry, attorneys for defendant and appellant.

OPINION BY THE COURT.

The defendant was examined as a witness on his own behalf, and on his cross-examination by the prosecution, testified that the deceased, on the occasion of the quarrel, which resulted in his death, called the defendant and his brother "damned sons of bitches." The witness further testified, "That is not the first time I heard him use that kind of language. Have heard him use it frequently. I don't know as he was a practical swearer. He was a profane swearer."

The prosecution called several witnesses in rebuttal, who were permitted to testify against the objection of the defendant, that they were intimately acquainted with the deceased in his life-time, and that he was not a profane swearer, and that they had never heard him use profane language. The defendant excepted to the ruling of the Court in admitting this evidence, and we think the exception was well taken. Whether, or not the deceased was a profane swearer, or in the habit of using profane language, was a purely collateral matter; and having no reference whatever to the guilt or innocence of the defendant. The first evidence on that point was brought out by the prosecution on the cross-examination of the defendant, and in such cases the rule is: "That if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him." The case of *People against McKeller*, decided at the last April term of this Court, is decisive

of the point. See also 1 *Greenl. Ev.*, §449. The evidence in rebuttal could have been introduced for no other purpose than to impeach the defendant as a witness, and we cannot say that it did not prejudice his case before the jury.

Judgment and order reversed, and cause remanded for a new trial.

Supreme Court Unwritten Opinions.

[No. 5876. Decided April 19, 1878.]

JUAN MATIAS SANCHEZ, Plaintiff and Appellant
vs.

E. P. F. TEMPLE et al, Defendants and Respondents.

Appeal from Seventeenth District Court. Los Angeles Co
Y. SEPULVEDA, Judge.

Action to set aside Mortgage and Conveyances.

STATEMENT OF THE CASE.

This is an appeal from judgment and order denying motion for new trial, and order denying motion for additional findings.

Mortgage and conveyances were executed to defendants E. J. Baldwin by Temple as plaintiffs appointee under a general power of attorney.

The banking house of Temple & Workman being in difficulties applied to E. J. Baldwin for a loan, who upon examination of their affairs, concluded to loan them \$310,000, which was evidenced by the note of Temple & Workman, and a mortgage by principal to receive the agent's note. By the terms of the note and mortgage it was agreed that if Temple & Workman should pay Baldwin, at the rate of 2 per cent a month on \$250,000 and at the end of the first year pay him \$100,000 and the same rate of interest for the second year, at the end of which a payment of \$150,000. would discharge the note. On a failure to pay the interest at the end of the month the same was to be added to the principal to bear a like interest, all additional compound interest to go to-

wards the discharge of an \$ 100,000, and that accumulating on the \$ 150,000 to operate similarly. It is claimed on the part of the appellant that a mortgage for the benefit of an agent cannot be executed under a general power of attorney to act for the principal, and further that Sanchez at the time of the making of such power of attorneys was not aware that it would be used for the execution of the mortgage to Baldwin. It is further contended by plaintiff that it was Baldwin's duty to inquire whether the money loaned on the note of third parties was secured by mortgage on the property of another, the evidence going to show his being aware that the money went exclusively to Temple & Workman, none going to Sanchez.

Judgment and order of the Court below affirmed.

V. E. and F. A. Howard, attorney for plaintiff and appellant.

Glassell, Chapman and Smiths, attorneys for defendants and respondents.

[No. 5946. Decided April 29th, 1877.]

In the matter of the Estate of J. P. WEEKS deceased.

Appeal from order and decree setting aside Homestead etc

STATEMENT OF THE CASE.

The facts in this case are as follows : On the 29th of August, 1877, J. E P Weeks died intestate in Sacramento, California, leaving certain real estate in said city, and as only surviving heirs at law, Jane M. Weeks, his widow and three children by a former wife deceased, said Jane M., the respondent in this case, being his second wife, and said children by a former wife appellants here, there being no issue of the marriage with respondent. No declaration of homestead was ever filed by said decedent or respondent during their coverture, but prior to his second marriage the former did file and record a homestead on the premises while he was a widower and head of a family of two minor daughters, appellants in this case. On September 27th, 1877, respondent filed her petition to set aside to herself as a homestead that portion of the block of land owned by decedent containing the dwelling house and other

improvements, which she prayed to have set apart to her as a homestead under sections 1465 and 1468 of the Civil Code, to which petition the children appellants here filed verified objections in which it was claimed that all of decedent's estate was his separate property before his marriage with respondent which was also found by the Court. Said respondent is as the Court further finds owner in her own separate right, of an interest worth \$ 3,000 in a block of land in the city of San Francisco. It is further alleged that if the homestead is set aside to respondent, there being no personal estate of any value, nothing will be left for the heirs appellant in this case. Under this state of facts the Court rendered a decree in favor of respondent without any limitation or qualification whatever, to which the next of kin duly excepted, appealing from this order and decree, it being an appealable order under section 969 of Code of Civil Procedure. On the part of appellants it is claimed that the Court below was without the power or authority to render such decree, and that the findings do not support the same. The Court after finding that in June 1867, decedent, then a widower, having two minor daughters, appellants here, made and recorded in due form a declaration of homestead, claiming and dedicating as a homestead for himself and family, the whole of his real property not exceeding the value at that time of \$ 5,000. Yet the Court notwithstanding such dedication as a homestead for decedent and his two daughters, sets the same apart to a totally different person, not then a member of his family, and at that time bearing no relation to decedent at all. On the part of respondent it is admitted that there was a homestead on the premises at the time of her marriage with decedent, but it is contended that if the same became the homestead of the parties after said marriage the widow was entitled to the same by survivorship, notwithstanding any subsequent changes in the law, citing as authorities for this opinion, *Estate of Headen* (July term 1877.)

S. F. Law Journal, 17.

Rich vs Tubbs, 41, Cal.

Hittell's Gen'l St. Sections, 3,541—3,544

It is further alleged on behalf of respondent, that if it were not the homestead of said parties after marriage,—it was property exempt from execution, and as such must be set aside by the express terms of Section 1,465 of the Civil Code;—but if neither a homestead or exempt from execution, the order of the Court is correct,—as the section of the Code before cited, provides that if no homestead has been selected, it is the province of the judge to select one which becomes the property in fee of the widow.

Judgment affirmed. Remittitur forthwith.

P. H. Coggins and *A. P. Catlin*, attorneys for plaintiffs and appellant.

A. C. Freeman, attorney for respondent.

[5842.—Decided April 29th, 1878.]

FRANK D. PRENTICE, Plaintiff and Appellant.

vs

ODD FELLOWS' SAVINGS & COMMERCIAL BANK,
et al., Defendants.

Appeal from Sixth District Court, Sacramento County.

S. C. DENSEN, Judge.

ACTION to determine plaintiff's right to purchase a certain tract of land of the State.

STATEMENT OF THE CASE.

On the third day of October, 1867, one John Wilson, applied through the State Locating Agent to purchase as lieu land, the southwest quarter of section No. 10, and the west-half of the west-half of section No. 15, in township 10, range 5, east Monte Diablo, base meridian.

After making such application, proceedings were had that said lands were ceded by the General Government to the State in lieu of certain other lands lost to the State by reason of having been included in the private Mexican land grant of P. B. Reading, and the application approved by the State Register, November 4th, 1867. Upon the approval of Wilson's application, the Surveyor General directed the payments of the

twenty per cent., and one year's interest in advance, to be made to the County Treasurer of Sacramento county, which order was complied with, and a certificate of purchase issued to said applicant,—a portion of said land was situated in Sacramento, and the remainder in Placer county.

On the first day of May, 1873, the sum of \$128, interest on the purchase money of said land becoming due, the Register of the State Land Office certified said delinquency to the District Attorney of Placer county, but failed to serve a similar notice on the District Attorney of the County of Sacramento. Notice of such delinquency was duly published in the former county, and suit was commenced by the District Attorney, on July 17th, 1873, but no affidavit was filed, authorizing summons by publication.

On the seventh day of October, defendant, J. S. Woods, holding under assignment from Wilson, paid the County Treasurer \$128. Subsequently Woods conveyed to the Odd Fellows' Savings and Commercial Bank, all his title as security for a loan.

On November 3rd, 1873, judgment against Wilson was entered in Placer county, a certified copy of which was afterwards filed in the Placer County Recorder's office, but not in the County of Sacramento.

On the twenty-second day of August, 1876, a motion was made to set aside said judgment of which no notice was given to plaintiff.

The Court below held that the land in controversy was not subject to sale by the State, under either the application of plaintiff or defendant Woods, and that the defendant, Odd Fellows' Bank, is entitled to perfect the original purchase made by the assignee of the certificate of purchase. The judgment for defendants was on appeal affirmed, remittitur forthwith.

A. P. Catlin, attorney for plaintiff and appellant.

J. H. McKune and *D. W. Welty*, attorney for defendant and respondent.

(No. 5607—Decided April 25, 1878.)

The People of the State of California, Plaintiff and Appln't.

VS

The Southern Pacific R. R. Co., Defendant and Respondent.

Appeal from the Nineteenth District Court, San Francisco,
E. D. WHEELER, Judge.

AMICABLE action to determine the right of State Harbor Commissioners to collect tolls, wharfage and dockage, at the wharf of the S. P. R. R. Co., in the City of San Francisco.

STATEMENT OF THE CASE.

Defendant has since the 28th day of February, 1876, and before this agreed case collected as dockage and wharfage in the aggregate, \$606, which sum was demanded by plaintiffs and refused, hence this amicable suit to decide the rights of the parties in the premises.

This is simply a submission of controversy without action under sections 1,138, 1,139 and 1,140 of the Code of Civil Procedure of the State of California to determine the rights of the parties to the collecting of the dockage, wharfage and tolls at respondent's wharf on Fourth street, in the city and county of San Francisco, which, it is claimed by plaintiff and appellant, is within the jurisdiction of the Board of State Harbor Commissioners, as shown by Section 2,524 of the Political Code as amended in 1876.

That the absolute right of a State to "control, regulate and improve the navigable waters within its jurisdiction, as an attribute of sovereignty, cannot be in any manner disputed," is decided in the case of *Gunter vs Grant*—1 St. Cal. 469. By the Act of incorporation of the city of San Francisco, passed at the first session of the Legislature, the Council was given jurisdiction over the city front—in the matter of erecting wharves, and fixing the rates of tolls thereon, as evidenced by the Statutes of 1851, p. 227.

In 1863 the State assumed control of the Harbor of San Francisco, and appointed commissioners to take possession of the city water front, as defined in said act of incorporation,

with all the improvements, rights privileges, franchise, easements and appurtenances connected therewith (valid leases excepted); and among other powers to collect such rents, tolls, etc., as they may fix from time to time under the authority of the Act, directing this transfer of jurisdiction. Statutes of 1863-64, p. 138 *St. Seq.* Said Board of State Harbor Commissioners, exercised the aforesaid rights from the time of its passage; until by an Act amendatory of the Political Code in 1876, it was provided that: "Said Commissioners, in addition to a general control over said premises, shall have authority to use for loading and landing merchandise, with a right to collect dockage, wharfage and tolls thereon; such portions of the streets of the city of San Francisco, ending or fronting on the waters of said bay, as may be used for such purposes without obstructing the same as thoroughfares.

The State having conferred no franchise or privilege on defendant to collect dockage, wharfage or tolls on that end of Fourth street fronting on the Bay of San Francisco by agreement of parties, this case was submitted to the Court below to determine the rights of the parties in the premises. The plaintiff and appellant claiming that the State having never parted with its right to collect dockage, wharfage and tolls on Fourth street, is entitled to judgment for the amount of the same collected thereon by defendant, which was denied by the Court, whereupon the plaintiff institutes his appeal. Judgment of the Court below affirmed.

J. B. Lamar, attorney for plaintiff and appellant.

Wilson & Wilson, for defendant and respondent.

THE legislative councils of the several Territories are hereafter to be anything but imposing bodies. By an act of the late Congress, the council, or upper house of each of these divisions of our country, is to consist of twelve members, and the house of representatives, or lower house, of but twenty-four. The numbers named are, however, large enough for all practical purposes.

Mining Decision.

ALBERT B. COREY et al.

In case of a relocated mine in dispute a hearing should be ordered to secure all the facts as to the relocation, abandonment, etc.

E. C. F DEPARTMENT OF THE INTERIOR, }
WASHINGTON, D. C. Jan. 25th, 1878. }

REGISTER AND RECEIVER.

Sacramento, California.

GENTLEMEN :—On the 2d of September, 1871, Albert B Corey, Samuel W. Stockton, William I Stockton, Isaac D. Stockton, A. W. Dewitt, Belden C. Hurlburt and Joseph Pervin filed in your office an application for patent for seven hundred and sixty linear feet of the Stockton mine, T. 14, N. R. 8 E., M. D. M.

The notice was published in the *Grass Valley Daily Union*, on the 6th of September, 1871, and for the full period of ninety days thereafter. No entry has been made upon said application.

On the 22d of July, 1877, Perry G. Gardner presented at your office an application for patent for fifteen hundred linear feet of the Stockton mine and a mill site.

Gardner bases his title to said Stockton mine upon a relocation thereof made by him on the 7th of August, 1876, which relocation is of record in the Recorder's office of Nevada county, California.

The premises described in said relocation embrace the premises for which Corey et al had filed their application for patent in 1871.

Gardner accompanied his said application for patent with his own sworn statement and those of other parties in which it is alleged that Corey et al abandoned said mine, and had failed to make the required annual expenditures upon said claim, and that for those reasons said mine was subject to relocation on the 7th of August 1876, and was legally appropriated by such relocation.

The question presented is, was the Stockton mine subject to relocation on the 7th of August, 1876 by reason of abandon-

ment thereof by its former owners, and the failure on their part to make the required anual expenditures upon the premises claimed by them.

To the end that this office may be enabled to have all the facts in the case presented before making a decision in the case, you will cause a hearing to be held to determine as to whether or not Corey et al abandoned said mine, or failed to comply with the provisions of section 2324 of the Revised Statutes of the United States in the matter of annual expenditures upon said claim.

You will inform all parties in interest hereof, and acknowledge the receipt hereof.

Very respectfully, your obd't serv't,

J. A. WILLIAMSON, *Comm'r.*

The Ellis Mission Land Grant.

In the case of Tripp vs Spring involving the validity of the deed from the State to George W. Ellis of a lot on Mission street, San Francisco, Mr. Justice Field on Monday last, sustained the validity of the deed, but on account of difficulty of locating land within the Pueblo survey (the survey being yet under consideration in the Land Department), the parties compromised and plaintiff has now dismissed the complaint. In his decision the Justice remarked that he thought a part of the lot in question was tide land and a part marsh land. In his opinion the line of the bay of San Francisco ran across the mouth of Mission Creek. If he was not right on this point the whole thing was left open. He would only pass upon this one point. The case could go to the Supreme Court, and if that tribunal holds that the Pueblo grant does not include the tide lands the other points in the case must be heard. The Justice expressed a wish that the Supreme Court might pass upon this point at an early day.

INCORPORATED BANKS NOT SUBJECT TO THE LICENSE LAW.—The attorney of the Pacific Bank has made the discovery that the Act known as the Bank Commissioners' bill, which became a law March 30th, 1878, annuls some of the provisions of the Broderick License Act, which became a law March 23rd, 1878. The Broderick Act imposes a tax on incorporated banks, and the bankers supposing it was all right, generally responded to the License Collector's demands, and paid up. The attorney of the Pacific Bank, however, submitted the following section of the Bank Commissioners' bill to the Collector:

"The duties of the Bank Commissioners shall be, within sixty days after their qualification, to prepare and furnish to every savings bank, and banking company incorporated under the laws of this State or any other State or country, and doing business in this State, applying therefor in writing, *a license*."

The Act throughout uses the word "license," and as a concluding section, declares that all acts inconsistent with that one are repealed.

The City and County Attorney was called on for an opinion, and he decided that the License Tax Collector could not collect from incorporated banks. It is supposed that the banks which have already paid one-quarter's license under the Broderick Act will petition for a return of their money. The inconsistency of the bills arises from the misuse of the word "license" in the Bank Commissioners' act. The obvious intention of having such a bill passed, was to put the banks upon a footing similar to that of the insurance companies, which cannot transact business without first producing a "certificate" from the Insurance Commissioner of their ability to transact such business, and meet all obligations. It was probably intended that the Bank Commissioners should issue certificates of enablement to the banks, but by using the word "license" the objects of the Broderick bill, so far as it relates

to incorporated banks, are defeated, and the city loses about \$30,000 per year.

A NEW criminal code went into effect in Virginia on the 1st ult. The most important feature in it is the establishment of the whipping post as a means of punishment for misdemeanors. The reasons for this measure are economy, and the fact that other punishments appropriate for minor offenses do not seem to deter the class who usually commit them. The Virginia Code, in the introduction of this form of punishment proceeds on an entirely different principle from that which is acted upon in England. In the latter country flogging is made a part of the penalty where the offense is of a dangerous nature, such as robbery with violation, while in Virginia it is imposed for trifling violence of law. In that State, however, the court before whom the conviction takes place has large discretionary powers, and may, in the case of a male offender, sentence instead to labor in the chain gang, and in that of a woman, to imprisonment in the county jail.

GROUNDS OF THE DECISION.—In deciding the case of the Quicksilver Mining Company vs Santa Clara Mining Association of Baltimore in favor of the defendant, Judge Sawyer held that the tax deed and judgment on which the plaintiff sued were both void on their face, because not authorized by law; that defendant had paid taxes regularly, and that judgment against the mine on which the plaintiff sued was found to be brought at the instigation of the Quicksilver Company when it was itself bound to pay the taxes, and that its purchase in its agents' name was a payment of the tax, and that Sheriff's deed passed no title. The Court stated other objections existed to the title as asserted by plaintiff which it was unnecessary to consider, as those mentioned disposed of the case.

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No. 18

Legal Notes.

THE MORE MURDER.—Sprague, the murderer of More was sentenced to be hanged at San Buenaventura, on Friday, September, 27th. An appeal has been taken to the Supreme Court from Judge Fawcett's decision.

THE DEBRIS CASE.—In the trial of the Mining Debris Case at Yuba City, the Court denied the motion of the defendants for a non-suit, and delivered an opinion to the effect that the plaintiffs had established a *prima facie* case, and that the extent of the interests involved rendered it especially desirable that the merits of the issue should be fully developed. It is decidedly for the advantage of the public that this case should be fought out to the end, and that all the legal points involved should be fairly tested, or should be put in the way of being tested.

CALIFORNIA LAND CASE DECISION:—On August 10th, 1877, the case of Jackson et al, vs the State of California, involving the right to certain land in township 15, San Francisco Land District, was decided by the Secretary of the Interior, it being held that the second section of the act of Congress, approved March 1st, 1877, entitled An Act relating to Indemnity School Selections in the State of California, confirmed to said State of indemnity selections which had been certified prior to its passage, excepting those for lands occupied by bona fide settlers prior to certification. Shortly after the decision was

made, Hawke and Shanklin, of counsel for certain pre-emption claimants, applied for a modification of the same, and were informed by the Secretary, after due consideration of the matter that his views were unchanged ; whereupon Hawke & Shanklin requested that the question submitted to the Attorney-General which was granted and, that official on the 12th instant sustained the decision of the Secretary as to the proper construction of the section of the act of 1877. In concluding his decision, the Attorney-General says : "A simple confirmation to the State of such lands because selections were otherwise defective or invalid on account of the condition of the lands when selected, was all that was necessary to quiet the title of the State to them."

DECISION IN A LAND CASE.—The Secretary of the Interior has reversed the decision of the Commissioner of the General Land office in the case of the application of the heirs of T. Wallace More to purchase certain lands in Los Angeles district, California. It seems that a grant of land was made by the Mexican government to Carlos Antonio Carrillo, and the territory of which Carrillo supposed himself possessed by this grant afterwards fell by purchase into the hands of Mr. More. It was established, however, that the original grant did not cover all the land to which Mr. More supposed that he was acquiring title. The Commissioner of the General Land Office decided that the land not included in the grant might be purchased by the heirs of Mr. More under the statute which provides that when persons in good faith and for a valuable consideration, have purchased lands of Mexican grantees or assignees, which grants have been subsequently rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, such purchaser may, under certain specified conditions, purchase the same at the minimum price established. The Secretary decides that the lands involved in this case are not of the kind contemplated in the statute, and refuses the heirs of More the right to purchase any of the lands outside of the corrected boundaries of the original grant.

Supreme Court Unwritten Opinions.

[No. 5935. Decided May 1, 1878.]

ISAAC SILVER, Plaintiff and Respondent.

vs

JOHN MULLAN, ET AL, Defendants and Plaintiffs.

Appeal from Seventh District Court, Lake County.

WM. C. WALLACE, Judge.

APPLICATION TO PURCHASE STATE LANDS.—Defendant had already bought more than three hundred and twenty acres of State land. Also held, that the Statute under which he purchased was nonsense, and could not be executed.

STATEMENT OF THE CASE.

This action was commenced February 6th, 1877, to establish the right of plaintiff to make application for, and purchase certain State land in Lake county, which had been previously applied for, and purchased by Mullen defendant, and conveyed to others. The findings in the case are, that, after the certain lands had been surveyed, and plat filed, and the Surveyor General had located them in part satisfaction of the 500,000 acre grant, the defendant, Mullen, on September 6th, 1870, filed his application with the Surveyor General to purchase the 320 acres in question; but that before doing so he had already entered and purchased more than 320 acres of State lands, in fact many hundreds of acres, in part satisfaction of said grant. That after the said lands were listed to the State on July, 14th, 1871, the Surveyor General, on January 31st, 1874, approved the said application of Mullen, and he entered the land, made part payment and interest, received his certificate, and, on February 5th, 1874, conveyed the land to one James M. Harbin, by deed in fee simple, and then on Feb. 10th, 1874, paid up in full and received a certificate of purchase for the land. No other application had yet been made for the land. On July 7th, 1874, Harbin mortgaged a part of the land (160 acres) to James McDonald, and on November 20th, 1874, conveyed the other 160 acres to other parties, and

they, on April 24th and December 14th, 1875, conveyed same to said James McDonald. On June 12th, 1876, McDonald foreclosed the mortgage against Harbin, and bought in the land (160 acres), and afterwards received his full deed. Now, on August 11th, 1876, comes the plaintiff, Silver, and files his application and affidavit with the Surveyor General for the same said 320 acres of land under title VIII of the Political Code, and on December 16th, 1876, filed in the Surveyor General's office a statement of contest of Mullen's right to purchase and hold said lands, and demanded a trial of same in court, and on December 19th, 1876, it was referred to the 7th District Court. The cause was tried, without jury, on August 7th, 1877, and the conclusions of law were that the application and affidavit of Mullen was invalid, and of no effect. That he had no right to purchase said lands from the State; and that James McDonald, who held through him, was not the owner; but that the plaintiff, Silver, was entitled to purchase them and upon payment, etc., receive a patent therefor. Judgment rendered accordingly and for plaintiffs costs \$ 19.

Defendants appealed from this judgment on November 19th, 1877.

On the appeal, the Appellant claims that his application for the land, being prior in time must be approved, if made in compliance with the then existing statute. But the act of April 4th, 1870, was then in force, amendatory of section 53 of act of March 28th. 1868. And section 4th of this act, requires of the applicant, "that he or she is citizen of the United States (or if a foreigner, then that he has filed his intention of becoming a citizen) and the application shall be forwarded to "the Surveyor General." This was held to be nonsense, and could not be executed, and until the code was adopted, that there was no way by which such lands could be disposed of by the State. The decision is quite important, but no written opinion was published.

Judgment affirmed—Remittitur forthwith.

Geo. A. Nourse, attorney for defendants and appellants.
Roche & Robinson, attorney for plaintiff and respondent.

[[No. 10,302.—Decided July, 22nd, 1878.]

THE PEOPLE OF THE STATE OF CALIFORNIA

VS

FONG AH TUCK.

Appeal from the Sixth District Court, Sacramento County,

S. C. DENSON, JUDGE.

ORDER.—

STATEMENT OF THE CASE.

The defendant in this case was at the April Term of the Sacramento County Court, in 1877, indicted for the murder of a Chinawoman, named Tsen Shing, who, in her dying declaration made shortly before her decease, charged—that defendant had cut her with a hatchet; beaten her with a long China pipe; a broom and iron door-bar, which he said he did, because he wanted her to pay him the money she owed him, amounting to two hundred dollars; and because, as he said, she “was of no account and could not earn the money.

On the strength of this statement defendant was arrested and tried for murder. On the trial the attending physician, and other witnesses testified that the deceased came to her death from injuries upon various parts of her person. The trial resulted in the jury finding defendant guilty of murder in the second degree.

Among instructions presented by defendant's counsel; and refused by the Court, were the following:

The dying declaration of deceased is hear-say evidence, and should be so considered by the jury.

The jury must be clearly satisfied that the woman Tsen Sing, at the time of her alleged dying statement was under a sense of impending death, and believed in a state of rewards, and punishments beyond the grave, or they should disregard the statement, which the Court refused as not being law. That the evidence tending to prove the infliction of the injuries upon the deceased was refused as not in accordance with the facts.

That the legal value of a dying declaration as evidence depends upon the belief of the deceased that she was about to die, and that after her death she would be punished if she made false statements in her declaration, and upon the accuracy with which the declaration is reported and preserved, which in this form was refused—the Court holding that her belief was not material.

If the jury believe that the deceased had not such a belief in a future state of existence, and of rewards and punishments as would induce her to tell the truth, they are at liberty to disregard it entirely. • For these and other reasons, defendant's counsel appealed from the judgment of the Court.

Judgment and order affirmed.

Curtis & Clinie, attorneys for defendant and appellant.

C. F. Jones, District Attorney for the people.

[No. 5944. Decided July 24th, 1878.]

J. B. MILLER, Appellant, vs. J. W. HENDERSON, Respondent.

Appeal from the Eighth District Court, Humboldt County,

J. P. HAYNES, Judge.

ACTION To quiet title—Validity of Tax title—Tax levy of 1872-3.

STATEMENT OF THE CASE.

Plaintiff brought suit to quiet title to lands situated in Humboldt county, alleging that defendant's title to the same was utterly unfounded either in law or in equity, and asked that judgment be rendered in his favor as against the defendant. Defendant set up a general denial, and claimed that title to the land was vested in him. The case was tried in the lower court in 1878, a jury was waived by the parties, and it was found that upon the 14th of April, 1868 and down to date of a certain conveyance by the Tax Collector of Humboldt county, plaintiff was the owner and entitled to the possession of the land. That said land was duly assessed to plaintiff for State and County taxes, for the fiscal year ending June 30th,

1873. That said property was duly assessed and equalized as required by law. That the taxes aforesaid were levied in accordance with law, and the statutes in such case made and provided; and that such taxes were not paid, That on March 12th. 1873 the Tax Collector, in accordance with and in a manner provided by law, sold at auction, the lands in contest to the defendant herein, for \$12.67, being the amount of taxes, costs, etc., due and allowed by law; that said property was not redeemed, and thereafter, on April 11, 1874, the Tax Collector executed a conveyance to Henderson in the form prescribed by sec. 3,785 of the Political Code. That all proceedings in relation to the assessment and sale of said land were regular and in accordance with law.

Judgment was given for defendant with costs.

From this judgment plaintiff appeals, alleging that, the findings, by showing that the sale was for State and County taxes for the year 1872-3 established the invalidity of the sale. That there was no legal levy of State taxes for 1872-3, and that the findings were not consistent with one another.

Respondent in reply stated, that the tax sale when made was valid by the laws of the State and the obligation could not be impaired by any subsequent act of the legislature or decision of the courts, altering the construction of the law.

Judgment affirmed.

I. Hanna and D. H. Whittemore, attorneys for appellant.

Chamberlain and DeHaven, attorneys for respondent.

(No. 10354—Decided July 29th, 1878.)

PEOPLE vs. FRANCISCO HERRERA.

GRAND LARCENY.—

STATEMENT OF THE CASE.

Defendant Herrera, was indicted in San Bernardino Co. for the larceny of two mules, for which he was tried convicted and sentenced to the State Prison. A motion for a new trial was made on the ground of misdirection of the Jury by the Court and that the verdict was contrary to law and evidence. The motion being refused an appeal was taken.

Judgment and order affirmed.

Graves and Waters, attorneys for appellant.

Hamilton, attorney general for the State.

[No. 5608.—Decided April 25th, 1878.]

PEOPLE OF THE STATE OF CALIFORNIA

vs.

HOOPER & HOOPER.

Appeal from the Nineteenth District Court, San Francisco,

E. D. WHEELER, Judge.

AMICABLE action to determine the right of State Harbor Commissioners to collect tolls.

STATEMENT OF THE CASE.

This case involves the same points as in the case of the People vs S. P. R. R. Co., reported in the last number of the RECORD; the action being brought for tolls collected by defendants as lessees of the Southern Pacific Railroad Company of Block No. 43, in the city and county of San Francisco.

Judgment of the Court below was affirmed.

J. B. Lamar, attorney for plaintiff and appellant.

Wilson & Wilson, for defendant and respondent.

[No. 6091.—Decided July 18th, 1878.]

EUGENE G. SAMPSON, Plaintiff and Respondent.

vs.

RUEL STICKNEY and SILAS COOMBS, Defendants and Appellants.

Appeal from Twenty Second District Court, Mendocino Co.

JACKSON TEMPLE, Judge.

ACTION Brought for the infraction of the covenants of a lease.

STATEMENT OF THE CASE.

On the 11th of June, 1873, plaintiff leased to defendants certain premises in Mendocino county, at a yearly rental of

\$400, which for the fourth being unpaid, suit was brought to recover the amount due. The demurrer of the defendant that the complaint did not state facts sufficient to constitute a cause of action, being overruled, the case went to trial, when the Court found that defendant had occupied the premises since the execution of the lease, and had not surrendered the same, and that plaintiff was entitled to recover the \$400 claimed to be due as rent, which defendants had failed to pay.

Judgment affirmed—Remittitur forthwith.

Thomas B. Bond, attorney for plaintiff and respondent.

McGarney and Caruthers, attorneys for defendants and appellants.

Supreme Court of the United States.

INDIANAPOLIS & ST. LOUIS R. R. CO.

vs.

JAS. L. VANCE, Collector of Edgar County et al.

Appeal from the Circuit Court for the Southern District of Illinois.

Upon the filing of the bill in this case by the Indianapolis and St. Louis Railroad Company, suing as a corporation organized under the laws of Indiana, against sundry County Tax Collectors in the State of Illinois, a temporary injunction was granted, restraining the defendants from levying on the property or taking any steps to collect taxes upon the capital stock of the complainant for the years 1873, 1874 and 1875, under or by virtue of any warrants in their hands for that purpose. The defendants, denying that there had been any assessments upon the capital stock of the complainant, insisted that the taxes in question were due upon assessments rightfully made by the State Board of Equalization of Illinois upon the capital stock and franchises of an Illinois corporation, the St. Louis, Alton and Terre Haute Rail-

road Company, over and above its tangible property, for so much of its main line and the Alton branch thereof as were leased to and operated in Illinois, by the Indianapolis and St. Louis Railroad Company, to whom defendants claimed the taxes in question were therefore properly charged. The cause by agreement of parties was submitted upon the pleadings and exhibits filed, and upon final hearing a decree was rendered dissolving the injunction and dismissing the bill. From that decree this appeal is prosecuted. The essential facts in the case are these: The Constitution of Illinois requires the General Assembly of that State to provide such revenue as may be needful, by levying a tax by valuation, so that every person and incorporation shall pay a tax in proportion to the value of his, her or its property—such valuation to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct. Persons or corporations owning or using franchises or privileges are to be taxed in such manner as the General Assembly shall from time to time direct, the tax, however, to be uniform as to the class upon which it operates.

In pursuance of the Constitution, the General Assembly, in the year 1872, passed a general revenue law providing for the assessment of property, and prescribing the mode for the collection of taxes. It contained specific directions for the assessment of the different kinds of property owned by [railroad companies, their visible and tangible property to be assessed under the heads of "railroad track," "rolling stock," etc. In reference to their capital stock, the statute provided that the "capital stock of all companies or associations," (other than banking associations organized under the general laws of the State,) "now or hereafter created under the laws of this State, shall be so valued by the State Board of Equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchises, over and above the assessed value of the tangible property of such company or association"—that value to be ascertained under such rules and principles as the Board might deem equitable and just.

The rule adopted by the State Board was this: To the market or fair cash value of the shares of capital stock and the market or fair cash value of the debt of the corporation, (excluding that created for current expenses,) and from this amount deduct the aggregate amount of the equalized or assessed valuation, as ascertained by the board, of all the tangible property of the corporation, the amount remaining to be taken as the fair cash value of the capital stock, including the franchise, which the board is required to assess against such corporation. At the annual meetings of the State Board held in each of the years 1873, 1874 and 1875 for the purpose of examining the abstracts of property assessed for taxation in the several counties, as returned to the Auditor of the State, and for the purpose also of equalizing assessments, the question arose as to the mode in which [the capital stock of the St. Louis, Alton and Terre Haute Railroad Company should be assessed for taxation. The difficulties which attended an intelligent discharge of that duty will be comprehended by a statement of the relations of that corporation to the complainant, On the 11th of September, 1867, the complainant, by a written contract of lease with the St. Louis, Alton and Terre Haute Railroad Company, acquired the right and assumed the duty of managing and carrying on for the period of ninety-nine years, commencing January 1st, 1867, the business of the principal or main line of the latter, 189 miles in length, extending from Terre Haute, Ind., to East St. Louis, Ill., and also of the Alton branch, four miles in length, subject to certain prescribed terms and conditions.

The tenth article of the lease is as follows: "The said party of the first part, (the complainant,) its successors, and assigns, shall and will at all times during the term aforesaid pay, or cause to be paid, any and all taxes, assessments, and imposts of whatever kind which shall or may at any time during such term be charged, levied, assessed, or imposed upon the said main line of said railroad and the said Alton branch thereof, or upon either or any part of either of the said railroads or their appurtenances, or upon any business or transaction

done upon them or either of them, or upon any income arising therefrom, or upon any property whatsoever the use of which during said term is hereby agreed to be furnished to the party of the first part, or which may be charged against or imposed upon the said party of the second part (the St. Louis, Alton and Terre Haute Railroad Company,) its successors or assigns, for or on account of its or their ownership of said railroads, or either or any part of either thereof, or of such property or any part thereof; provided, however, that nothing in this contract contained shall be so construed as to render the party of the first in any way liable for the tax specifically upon the income of the holders of the bonds or stocks of the party of the second part."

Under this lease the complainant took possession of all the property connected with or essential to the business of the principal line and Alton branch of the lessor. Some doubt having been expressed as to the validity of the lease under the laws of Illinois, an act of the General Assembly of that State, approved March 11th, 1869, directs that the lease "be and stand confirmed according to the terms" thereof; and the second section provides: "The said lessees, their associates, successors, and assigns, shall be a railroad corporation in this State under the said style of "The Indianapolis and St. Louis Railroad Company," and shall possess the same or as large powers as are possessed by said lessee corporation and such other powers as are usual to railroad corporations. Said Indianapolis and St. Louis Railroad Company may and are hereby authorized to extend said line or road from any point on the same between the cities of Pana and Litchfield, on the said road, or from either of said points, westward to the Mississippi river, opposite Louisiana, or any point below, not exceeding 15 miles, in the State of Missouri, with a branch thereof to the City of Quincy, in the State of Illinois, and the same to connect with the railroad bridge over said river at said City of Quincy."

At its annual meetings in 1873, 1874 and 1875 the State Board made assessments upon the capital stock and franchises

of the various railroad companies of the State over and above their tangible property respectively. Having ascertained the fair cash taxable value of the capital stock, including the franchise of the St. Louis, Alton and Terre Haute Railroad Company, without any reference to the lease made by the latter, it fixed the sum of \$2,918,184, \$1,125,139 and \$1,004,416 as the proposition of such valuation which should be distributed for the years 1873, 1874 and 1875, respectively, to the counties on the line of the leased railroads, assigning to each county, in conformity to the rule prescribed by the statute, such proportion of those annual assessments as the length of line in such county bore to the entire length of the leased railroads in the State. The assessment thus distributed to the several counties through which the leased railroad passed were charged to the Indianapolis and St. Louis Railroad Company. The balance of the assessment upon the capital stock and franchises was distributed to the counties upon the lines which the St. Louis, Alton and Terre Haute Railroad Company operated, and were charged directly against it. While on the part of the capital stock of the present Company, it is evident, as the Court think, that the intention was to levy the warrants upon such of the leased property as could be seized for the payment of taxes under the laws of the State. Whether the assessment and intended levy were in accordance with the State law are the essential questions in the case, and the decision is that they were, and the decree is affirmed; the case disposing also of No. 89I.

Mr. Justice Harlan delivered the opinion.

THE CIVIL DAMAGE LAW.

The Statute of Ohio known as the civil damage law, the provisions of which have been incorporated into the statute law of many other States, provides that every "person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication" of any person, shall have a right of action against the one

selling or giving the liquor causing the intoxication, or owning the premises on which it is sold or given. In *Davis vs. Justice*, 31 Ohio, St. 359, the Supreme Court of Ohio holds that under this statute damages resulting from the intoxicated person cannot be recovered. In this case, liquor was sold to the husband of plaintiff below, and the intoxication therefrom caused him to be killed by a train of cars. By the common law it is clearly settled that actions for personal injuries abate by death, and cannot be revived or maintained by the executor or by the heir. In *Baker vs. Bolton*, 1 Campb, 493, which was an action for injuries to the plaintiff, and his wife from which she died it is said: "The jury could take into consideration the bruises which the plaintiff himself had sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil court the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." Before this case the books of the common law show no instance in which such damages were claimed, and the doctrine of the case was unquestioned until 1873, when it was by the plaintiff, in *Osborn vs Gillett*, L. R., 8 Exch, but it was reaffirmed. To give such right of action there must be express statutory authority. *Cunning vs Williamstown*, 1 Cush. 451; *Whelford vs Panama R. R. Co.*, 23 N. Y. 465. In *Mobile Life Ins. Co. vs Brame*, 95 U. S. 754, it is said: "The authorities are so numerous and so uniform to the proposition that by the common law, no civil action lies for any injury resulting in death, that it is impossible to speak of it as a proposition open to question. And as the Court in the principal case says, that if to the creditor or heir, the law affords no remedy for pecuniary injury resulting from death, it is difficult to see why it should be allowed to one sustaining another relation to the deceased."

New York Supreme Court.**LEVI W. HALL, Respondent, v. JOSEPHINE F. CROUSE****Adm'r's, et al, impl'd Appellants.**

MORTGAGE.—Parol evidence is admissible to show the object of a mortgage and the amount of advances upon it; and also to show that it was given to secure a party not named therein.

Although a mortgage given to secure further advances or services is valid, even when it does not express the object, yet advances made, or services rendered after the attaching of a subsequent lien by mortgage or judgment, are subject to the priority of the latter lien.

A mortgage given by a client, to secure his attorney for past and future services, is a valid security.

Appeal from judgment in favor of plaintiff, entered upon report of referee.

Action to foreclose a mortgage executed by one Clary to plaintiff, as collateral to a bond of the same date. Appellant's intestate was a subsequent judgment creditor of Clary, and defendant on the ground that the mortgage was fraudulent and void as against creditors of the mortgagor. Upon his death, appellants were substituted as defendants in his place.

The bond and mortgage were conditioned for the payment of the sum of \$1,000 in the three months from its date with interest.

At the trial, plaintiff offered parol evidence to show that the bond and mortgage were executed to secure plaintiff and Isbun N. Ames, for any legal services which had been, or might be rendered by them or either of them for Clary. An objection to this offer was overruled, and the evidence received.

Held, That if there was any error in this ruling, it was merely as to the order of proof; that it was not prejudicial to defendant, as he was thereby advised of the strength of plaintiff's proof on the issue of consideration before he entered on his own.

It was claimed by appellants that, as nothing appears in the mortgage to show that it was intended as a security for future services, it is void against creditors so far as it was intended to cover such services.

Held, Not tenable. It is well settled in this State, that a mortgage may be executed, or judgment confessed as security for future advances, in whole or in part, made pursuant to a contemporaneous agreement, and will be an effectual security for such advances against subsequent incumbrancers having notice of the judgment or mortgage. It is necessary, however, that the agreement should give all the requisite information as to the extent and certainty of the contract, so that a junior creditor may, by inspection of the record and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. Parol evidence is competent to show the object of mortgage or judgment, and the amount of advances upon it. 6 N. Y., 147. Where, however, a mortgage is given to secure advances, the omission to state in it the object, subjects it to suspicion, and the holder will be put to strict proof of the payment of the consideration. 2 Sandf. Ch., 78. It was also competent to show by parol that by an agreement at the time between the parties to the mortgage and Ames, a part of the consideration was the services of Ames; in other words, that as to such part, plaintiff received the mortgage in trust for Ames. The evidence did not tend to contradict the mortgage, 5 Barb., 153; and the mortgage was a valid security for the services of Ames, as well as those of the mortgagee, to the extent of the lien expressed in it.

Also held, That the agreement in this case was merely one made by a client to secure his attorney and counsel for past and future services. We are not aware of any rule of law in this State which is violated by the agreement, or of any case in this State holding that such an agreement is void. That the client executed the mortgage voluntarily, understanding its import, and that he has received the value of the amount reported due upon it, is obvious from the evidence and the findings of the referee. To that extent it is a valid security.

Merritt vs Lambert, 10 Paige, 352; 2 Den., 607 distinguished.

The referee found that services had been rendered by plaintiff and Ames of the value of \$745; and that that amount

was due on said bond and mortgage, and directed a decree of foreclosure and sale for that amount. It appeared that one of Ames' charges; viz., \$30, accrued subsequently to the recovery of the judgment in favor of appellant's intestate.

Held, Error. It is a settled rule, that although a mortgage to secure further advances or services is valid, even when it does not express the object, yet advances made or services rendered after the attaching of a subsequent lien by mortgage or judgment are subject to the priority of the latter lien. 5 Johns. Ch., 320; 1 Sandf. Ch., 43; 2 Id., 630; Id., 481. The item of \$30 should be excluded from the amount for which plaintiff's mortgage is given priority over the judgment.

Judgment reversed, and new trial ordered before another referee, costs to abide event, unless plaintiff consent to that reduction, in which case judgment as modified affirmed without costs.

Opinion by *Smith, J.*; *Mullin, P. J.*, and *Talcott, J.*, concur

THE GOVERNMENT AND THE EIGHT HOUR LAW.—The Attorney General of the United States in response to the inquiry of the Secretary of the Navy, decides that a circular issued by the Navy Department, wherein it was stated that the department would contract for the labor of mechanics' and laborers on the basis of eight hours to a day's work, but would allow workmen who elected to work ten hours a proportionate increase of their wages, is not in violation of section 3738 of Federal Revised statutes, which declares that eight hours shall constitute a day's work for laborers employed by or on behalf of the Government of the United States. The opinion is based upon the reasoning and conclusion of the United States Supreme Court in *United States vs Martin*, 4 Otto, 400, where it is held that the statute merely prescribes the length of time which shall amount to a day's work when no special agreement is made upon the subject, and that it does not forbid the making of contracts fixing a different length of time as the day's work.

IMPORTANT DECISION RELATIVE TO ATTACHMENTS.

The following decision has been rendered by Judge Daniel Belden of the Twelfth District Court, which is of importance as a step toward settling the legal rate to be paid Sheriff's keepers while in charge of the property under attachment. This rendering was made in the suit of Richard Day vs H. Prindle, in which the furniture in the latter's residence was under attachment. Under instructions from the plaintiff, the Sheriff of Santa Clara, placed a keeper in charge of the building. The keeper was upon the premises seventy-eight days, and was boarded and lodged by defendant at the house. This keeper withdrew and another took charge, who remained in possession thirty-three days, when a bond was given and the attachment released. Judgment was given in the general case in favor of defendant. It was contended by the defendant, first, that this was not a proper case for the appointment of a keeper, but that the Sheriff should have removed and stored the furniture. Second, that the charge for keepers' services, three dollars per day, was extravagant, and more than should be allowed. The question before the Court, whether the Sheriff should remove and store the property taken under an attachment, or should place a keeper in charge of the same, was, said the Judge, one of sound discretion, to be determined by the amount, character and situation of the property. If there was but a small amount of property, so situated that it could be readily removed without inconvenience, it should be done. In the present case a large amount of valuable and expensive furniture was at the residence of the defendant, and in use by his family. To have removed it would have been detrimental to the furniture and cause a great inconvenience to the family. The Sheriff exercised sound discretion in placing a keeper in charge of the property. As to the compensation of the keeper, the Sheriff is to exercise the same sound discretion. In the present case for the services of the keeper, who was boarded and lodged by the defendant, the allowance will be \$1 per day—\$78; the keeper who while in charge, boarded himself, will be allowed \$2 per day—\$66.

WHAT IS AN INFRINGEMENT.

In the *Singer Manufacturing Co. vs Wilson*, House of Lords (26 Weekly R., 664), several important points in the law of trademarks were settled; among others, that although the defendant has a specific and distinctive trademark of his own placed upon all his goods, he may be enjoined from using by way of advertisement, the name of the plaintiff; also, that to sustain "an injunction," it is not necessary to prove fraud. The Court may enjoin the continuance of an infringement which was inadvertently commenced, or commenced under a mistaken belief of right. It was conceded, however, that the question of the right to damages might depend upon a different principle. Several members of the court further have the sanction of their opinion to the doctrine urged with increasing cogency by later cases, that the chance of misleading should be jealously estimated by the court, even though ordinary attention might have been enough to protect buyers from mistake. It is familiar experience that distinctions between the imitation and the genuine become very plain, in the course of a judicial examination, which would be scarcely recognized in the ordinary course of trade by careless or even average purchasers and consumers; and the courts should, and according to late cases do recognize this fact, in considering whether there is wrongful imitation.

So it seems to have been held in *Reade vs. Conquest* (10 Weekly R., 271, 11 C. B., N. S., 479), in the case of dramatic copyright, that there may be a representation of a part so as to infringe on the author's right of property, although the person presenting it was quite unconscious that he was taking anything from plaintiff's drama, and, indeed, although he was not aware that plaintiff had composed one.

In *Chatterton vs. Cave*, House of Lords (26 Weekly R., 498, affirming 25 id., 102; L. R., 2 C. P. D., 42), it was held that the mere taking by one dramatic author of one or two points or situations from the drama of another cannot be

considered an infringement, if found as a matter of fact to be of not substantial or material, and if the defendant's drama is not a copy or colorable imitation in other respects.

THE U. S. Treasury Department directs that unsealed packages of newspapers from foreign countries, not exceeding in weight two pounds, three ounces, may be delivered to the persons addressed without detention by custom officers.

MECHANICS' INSTITUTE.—The thirteenth grand exhibition of science, art and industry, given under the auspices of the Mechanics' Institute, will open at the Pavilion on Market, Eighth and Mission streets, on Tuesday, August 13th. Great and unusual attractions will be presented to visitors. Mining, agricultural and other machinery will be in motion. Pacific coast manufacturers, minerals and products of the soil will be fully represented, besides new and many other interesting novelties never before exhibited on this coast. The Art Department will be under the supervision of the San Francisco Art Association, a guarantee for excellence and completeness. Local art will be specially represented, also works of noted foreign artists, selected from private galleries of this city. The Horticultural Garden so popular heretofore, will be made still more attractive this year, by the addition of many new features.

THE North Pacific Telegraph Company was dissolved by the County Court, August 8th, in pursuance of a resolution of the stockholders adopted on the 29th of last June,

CALIFORNIA LEGAL RECORD.

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AUGUST 10, & 17, 1878.

Nos. 19 & 20.

Legal Notes.

THE WILL-MAKING POWER—The New York legislature signalized the final rush of business pushed through the last day before adjournment by the passage of a remarkable bill affecting the will-making power. The principle of the bill is one which limits by one-half the testamentary control which a person has over his own property. This new law, however, discriminates only against particular forms of bequest, namely such as are intended for "benevolent and charitable uses." The wording of so significant a law is worthy of notice. It is as follows: "No person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, missionary or social society or corporation, or to any eleemosynary society or corporation whatever, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts and the lawful expenses of administration. And such devise or bequest shall only be valid to the extent of such one-half and no more; and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

THE next conference of the Association for the Reform and Codification of the Law of Nations, will be held at Frankfort on the Maine (Germany), on the 20th to the 24th of this month. The subjects to be discussed at the meeting will

include every matter about which it is desirable that the different nations of the earth should have an understanding, such as copyright, codification of international law, extradition of criminals, and arbitration for the settlement of international disputes.

WITNESS' FEES.—As much ignorance in the matter of witness' fees seems to generally exist, and as persons are frequently debarred thereby from their legal rights under the Code, a brief statement of the facts may prove acceptable. In all cases where the People of the State are plaintiff it may be stated as a general proposition that no fees or recompense for time lost or expenses incurred will be paid, as the law contemplates the witness in the prosecution of his own business.

In civil cases a witness is entitled to the amount of fees prescribed by law for such services, and may demand such payment at the time the subpoena is served, and failing to receive such sum may refuse to testify until it is paid. The refusal to accept the fee does not excuse a witness properly subpoenaed from attendance or testifying, and only lays him liable to punishment and contempt. It is a common occurrence to see persons put upon the stand, who, after taking the oath to "tell the truth, *the whole truth*, and nothing but the truth," object to giving any testimony on the ground that they have not received the fees to which they are entitled. They are then informed by the judge in a voice expressive of the deepest sympathy that having sworn to tell *the whole truth* they have no recourse but to proceed and tell it as promptly as possible. The judge's urbane manner no doubt is well calculated to make the unfortunate witness unconscious of his misery until his hand encounters the dreary void of his pantaloons' pocket, yet the latter event is sure to occur unless the litigant in whose interest the witness is summoned belongs to that class of philanthropists who voluntarily pay their debts, for he has got the witness "foul" and can make his whole stock of testimony at his own valuation on long time. If the witness desires to demand his fees before testifying he must do so before taking the oath.

PENSION CASE DECIDED.

On an appeal from the decision of the Commissioner of Pensions, where the claim of the party for bounty land had been rejected under section 3480 Revised Statutes, which prohibits the payment of any account, claim or demand against the United States which occurred or existed prior to April 13th, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, or was not known to be opposed thereto and distinctly in favor of its suppression, Secretary Schurz has sustained the decision of the Commissioner rejecting the claim.

The Secretary says:

The fact that he was "utterly and outspokenly opposed to secession up to the war," does not meet the requirements of section 3480; that during the war he was "opposed thereto, and distinctly in favor of its suppression." Neither does the statement that he contributed to the comfort of his sons indicate that he was dissatisfied with the service in which they were engaged.

While he may have been "utterly and outspokenly opposed to secession up to the war," as were many others after secession was an accomplished fact and after the conflict of arms had commenced, he may have been earnestly and decidedly in favor of the success of the Confederate government. He must show affirmatively that he was opposed to the rebellion, its suppression, and that he did not encourage or in any manner sustain it.

There may be cases where persons paid taxes to the Confederate government under duress, who should not thereby be prejudiced in a just claim which had accrued or existed prior to 13th of April, 1861.

Cases may also arise in which the sons or husbands of claimants enlisted in the rebel army, to whom the claimants furnished food and clothing from love and affection and the dictates of humanity, when the claimants should not be held within the prohibition of that section; but in every such case

it must distinctly and affirmatively appear that the claimant was opposed to such enlistment, and while apparently acquiring therein, was distinctly opposed to the war and in favor of its suppression. In other words, the test of a person's right to have his claim allowed should not be acts done by him under duress nor under circumstances beyond his control, but he should be allowed to show in connection with such acts the facts and circumstances under which they were performed, and that while such acts were done by him his motive and feelings were not thereby truly represented.

WHAT IS A SAVINGS BANK?

The Supreme Court of the United States was obliged to answer this question a few days ago in its decision of a suit brought by the personal representative of a depositor in the National Savings Bank of the District of Columbia to recover an interest in the franchises and property of the corporation. The Court decided that this Savings Bank is not a commercial partnership nor a corporation, the members of which have any property interest in it, and that it was not strictly eleemosynary. The decision describes the true savings bank as "intended only for provident investment, in which the management and supervision are entirely out of the hands of persons whose money is at stake, and which are quasi benevolent and most useful, because they hold out no encouragement to speculative dealing or commercial trading." This is the character of the old Savings Banks of this and other cities, and it is only because speculative concerns, having nothing in common with the original system, having stolen their name, that savings banks have become associated in the public mind with fraud, bankruptcy. In all the larger cities there are such corporations as the Philadelphia Saving Fund, a fact noted by the Supreme Court, when it says: "Very many such exist in this country, and, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disin-

terested persons, the profits of which, after deducting the necessary expenses of the bank, inure wholly to the benefit of depositors, in dividends, or in reserved surplus for their greater security."—*Philadelphia Ledger*.

Authority of a Notary Public to Commit a Witness for Contempt.

The following is a recent opinion of Judge Bakewell of the Appellate Court of St. Louis, on the authority of a Notary Public to commit a witness for contempt in refusing to answer a question :

Ex parte R. M. Scruggs, habeas corpus.

The petitioner claims that he is illegally imprisoned in the jail of the city of St. Louis, under authority of a certain commitment issued by a notary public. The commitment shows that petitioner attended, and was examined on oath before the notary in a certain cause pending in the St. Louis Circuit Court; that he refused to answer a question put to him on that examination, and was committed for the contempt for the space of ten days, or until he purge himself of the contempt. A notary public is authorized to take depositions, and for that purpose has the power conferred on justices of the peace, and if the witness attends and refuses to give evidence which may lawfully be required to be given, the notary may commit him to prison until he give the evidence: *Ex parte* McKee, 18 Mo., *Ex parte* Mumford, 57 Mo.

The jurisdiction being established, the judgment of the magistrate, and his interpretation of the law, and of its application to the facts before him, cannot be reviewed on a writ of habeas corpus. It is not pretended that the question asked the witness was one which it was his personal privilege to refuse to answer. The objection that the evidence demanded was irrelevant, cannot be urged on an application of this nature: *Ex parte* McKee, *supra*.

There is, however, a suggestion of want of authority on the part of the officer. It is urged that section 17 of the scheme of separation between the city and county of St. Louis

which provides that "all notaries now commissioned by the governor for St. Louis county, shall exercise their duties within the city and county of St. Louis, as constituted by this scheme," is a provision which the board of freeholders had no power to enact.

It is going far to ask a judge in chambers to try title to an office on an application for *habeas corpus*. No authority is cited in support of such a position. *Habeas corpus* is the remedy for illegal imprisonment, but the imprisonment is not illegal where the process is a justification to the officer and process from a *de facto* officer, not defective in the frame of it and issued in the ordinary course, from a magistrate having jurisdiction, will protect the officer: 1 Hale, P. C., 488; Com'm'th vs. Leckey, 1 Watts, 66; Freen. Ex. § 101.

There seems to be nothing in the objection that the commitment is signed by the officer by his initials only. The officer is described in the body of the writ, as "L. A. McGinnis," and the signature corresponds with the description. A consonant may be a name. I knew a man who named his children by the letters of the alphabet, and this notary may have no other given name than "L," for all that appears: Tweedy vs. Jarvis, 27 Conn., 52. But if his name appeared to be "Louis," I should still think the signature to the account good, there being no question as to identity.

The return in this case shows a commitment for contempt, plainly charged. The officer had a right to compel an answer to the question, as it was not a privileged one, and he did not, therefore, exceed his jurisdiction. To refuse to answer was a plain contempt. The relevancy of the question was a matter for the Circuit Court on the trial, and not for the witness. Appellate Courts do not exercise appellate jurisdiction in *habeas corpus*, and they will not, in such proceedings (and, *a fortiori*, a judge in chambers will not,) review the acts of the committing magistrate where he has acted within the scope of his jurisdiction, and there are no such gross defects as render the proceeding absolutely void: *Ex parte Ruthven*, 17 Mo., 542.

The prisoner must be remanded. It is so ordered.

Supreme Court of California.

[July Term, 1878.]

[No. 5830.—Filed August 12, 1878.]

WM. PRESCOTT, Plaintiff and Appellant.

VS.

JOHN SALTHOUSE, GREGORY SANCHEZ, and ALBERT SPITS, Defendants and Respondents.

Appeal from the Twentieth District Court, San Benito County,—

BELDEN, Judge.

DISMISAL OF APPEAL.—ATTORNEY OF RECORD.—An order was made, at trial by the Court below, associating Julius Lee as attorney of Record with Baggs & Tully for the Plaintiff. The Code of Civil Procedure only provides for a substitution,—in two modes,—in either of which, WRITTEN NOTICE must be given the adverse party. Without this, Mr. Lee, acting as sole attorney, conducted this appeal, hence, HELD, that it must be and is dismissed.

STATEMENT OF FACTS.

On and prior to February 14, 1867, the plaintiff, and defendants, with other parties, were in possession and occupation of certain United States public lands in San Benito County, still unsurveyed, each having his portion separately enclosed, which claims and enclosures did not conform to the survey and lines afterwards established.

Plaintiff obtained a patent by pre-emption for his claim, then brought suit for certain portions of his claim, which were within the enclosures of Salthouse and Spits.

Defendants admit plaintiff's *title*, but claim rightful *possession* of the fractional tracts they occupy, based upon an agreement made in writing on February 14, 1867, to convey to each other, upon acquiring title, any such portions as should prove to fall within their respective enclosures, upon survey. The case being tried by the court, without a jury, the finding was that plaintiffs do not recover for the land, but that, upon defendant Salthouse paying to plaintiff \$116.31, he should convey to Salthouse the seventeen acres, and a fraction lying in his enclosure; and that upon payment by Spits, of \$4.00 to plaintiff, he should convey to *him* the forty-four hundredths of an acre, lying within *his* enclosure.

It will be seen that the decision on the appeal is not upon the merits of the case, but the appeal is *dismissed* upon the following showing of the respondent:

"The appeal from the order overruling the motion for a new trial cannot be considered, because the appeal is not taken by and through an attorney of record in the action, and because the motion for a new trial was not made by an attorney of record in the case; which objection was taken before the respondents proposed any amendments to the statement."

Julius Lee, attorney for plaintiff and appellant.

William Matthews, attorney for defendants and respondents.

(*Tully and Baggs*, original attorneys for plaintiff.)

OPINION BY THE COURT.

Upon trial of this action judgment was rendered for the defendant. Subse-

quently Julius Lee, Esq., subscribing himself "Attorney for Plaintiff," served upon the attorney for the defendant a notice of intention to move for a new trial, and in due time thereafter presented to the Judge who tried the cause a proposed bill of exceptions in support of the motion for a new trial. The regularity of the service of the notice and presentation of the bill of exceptions were duly objected to by the attorney of the defendant, on the ground that Mr. Lee was not the attorney of record of the plaintiff, and was therefore not competent to give a notice or present a bill of exceptions in the cause. These objections were duly noted and preserved in the bill of exceptions sent up in the record. The Court below denied the motion of the plaintiff for a new trial, and thereupon Mr. Lee, as attorney for the plaintiff, filed a notice of appeal from the judgment and order denying a new trial, and caused service thereof to be made upon the attorney for the respondent, by a transmission of a copy through the postoffice.

At the argument here the appeal from the judgment was dismissed, because not brought within one year after the entry of the judgment below.

The counsel for the respondent insists that the appeal from the order denying a new trial must also be dismissed, because Mr. Lee, by whom the procedure on appeal is conducted, is not the plaintiff's attorney of record.

Mr. Lee certainly was not an attorney of record for the plaintiff at the commencement of the action, nor did he thereafter appear therein in anywise, previously to the trial. At the trial, however, an order of the Court below was made as follows: "Ordered, that Julius Lee be, and is hereby associated as attorney of record with Messrs. Baggs & Tully, for the plaintiff, etc." This order was made on the fifth day of August, 1876, and the clerk having omitted to enter it in the minutes, it was subsequently, and on August 8, 1876, entered therein, *nunc pro tunc*, as on the former day.

Such an order—that is, an order associating a new attorney—is unknown to the practice as prescribed by the Code of Civil Procedure. That Code provides for the substitution of one attorney for another, either upon the consent of the superseded attorney or upon the application of the client, after notice to the attorney of record. (*Code Civil Procedure*, sec. 284, *et seq.*) Upon such a change, made in either mode, written notice must be given to the adverse party, and until such notice given the former attorney must be recognized. (*Id.* sec. 285.) It follows, therefore, that even if the *nunc pro tunc* order is to be regarded as operating a substitution of Mr. Lee, it was ineffectual for want of the prescribed notice.

But as seen already, it was, in its very terms, merely an association of Mr. Lee with the attorneys of record for the plaintiff. It did not, in any view, purport to authorize him to act solely as the attorney for the plaintiff, but only in conjunction with the other attorneys for the plaintiff, who had not been superseded or removed.

The notice of intention to move for a new trial was, however, not given by Mr. Lee, as attorney for the plaintiff, associated with the other attorneys for the plaintiff, but as sole attorney of record of the plaintiff—a position in which, as observed already, the *nunc pro tunc* order did not purport to place him.

If Mr. Lee desired to appear at the trial as counsel for the plaintiff, an order of the Court was not necessary to enable him to do so.

We think, therefore, that the objections taken by the counsel for the respondent must prevail, and the appeal from the order denying a new trial must be dismissed; and it is so ordered.

[No. 5743.—Filed August 12, 1878.]

J. P. CAVE, et als., Plaintiffs and Respondents.

VS.

M. H. CRAFTS, et als., Defendants and Appellants.
Appeal from Eighteenth District Court, San Bernardino County,—

MCNEALY, Judge.

WATER RIGHT APPURTENANT TO LAND.—The purchase of land carries with it all the apparent benefits and easements, as previously enjoyed, without any EXPRESS reservation or grant and the word "appurtenances" is not necessary to such conveyance. The grant of the PRINCIPAL carries the INCIDENT.

AN "EASEMENT" to real estate granted is a privilege OFF and BEYOND the local boundary of the land:—in this case of conducting water through the lands retained by the common grantors of the plaintiffs and defendants; and no subsequent act of their grantor could divest them of their right. But to acquire a RIGHT to water by ADVERSE USE for more than five years, the use must be OPEN, as of RIGHT, also PERMANENT. If disputed, or interrupted, however slightly, by the owners, the acquisition of such right is prevented.

The existence of an easement will support an action for trespass.

The Supreme Court have repeatedly held, that, where the court below has assumed the denial of all the material allegations, the insufficiency of that denial cannot be pleaded here.

The Act of Congress, passed July 26, 1866, "granting right of way to ditch and canal owners over the public lands," conferred and confirmed rights to waters previously appropriated, for AGRICULTURAL purposes.

STATEMENT OF FACTS.

Action brought to restrain one defendant from the *usque* use of the water of a certain irrigating ditch in San Bernardino County; and its unauthorized use by the others.

Plaintiffs claim that from and ever since May 1, 1853, they and their grantors have owned the water ditch known as the "Mill Creek Water Ditch," with the exclusive right to divert into it, for agricultural and irrigating purposes, all the flow of water of "Mill Creek," from which it runs.

This right they exercised fully up to June 23, 1870, when the defendant Crafts acquired a limited interest in the same, *i. e.*, the full flow of the water during certain hours of certain days only. Other certain parties also had limited rights to the water, for certain hours of certain days respectively, which they used accordingly. Subject to all these rights, the remaining plaintiffs in this case claimed the exclusive right to the full flow of the water at all times, and their rights began on January 30, 1875, and from which time certain numerous parties have used the water for irrigating purposes; and from June 20, 1875, have frequently, up to the time of this action, used *all* the water, so that plaintiff had not even enough for household use.

Alleging that defendants threatened to continue this practice, a restraining order was asked for, compelling all the defendants to desist from using the water, except as was their right; and the Court, upon investigation of the original

course of the water flow, and its subsequent diversion and use, granted a perpetual injunction accordingly, but allowing the intruding defendants water for household use and watering stock. A new trial was moved by defendants, on various grounds, which was denied, and this appeal taken.

Waters and Swing, attorneys for plaintiffs and respondents.

Volney E. Howard and H. M. Willis, attorneys for defendants and appellants.

OPINION.

MCKINSTRY, J.

There can be no doubt that the appellant, Crafts, is bound by the decree in *Folks et als. vs. Crafts*, so far as is concerned any claim on his part to the use of waters, by reason of his one-sixth interest in the Carpenter ranch. Even if the same subject matter were involved in the prior action of *Crafts vs. McCoy* the judgment in the prior action was not pleaded as a former determination in *Folks vs. Crafts*. But the issue was different. In *Folks vs. Crafts* the question was, what were the rights of the parties with respect to the use of certain waters when that action was commenced. *Crafts vs. McCoy* had been finally adjudged before Crafts acquired his one-sixth interest in the Carpenter ranch; and Crafts acquired the one-sixth interest prior to the commencement of the action of *Folks vs. Crafts*. All the rights of Crafts in the waters of the stream, as they existed when the suit of *Folks vs. Crafts* was brought, were necessarily settled by the decree in that case, since they were, or could have been there asserted.

* Appellant Crafts claims the right to continue the use of water on the "See" and "Criswell" places, by reason of *adverse use* for more than five years. It is enough to say that the use of water upon those places—as the case clearly shows—was not peaceable, as that term is applied in connection with the subject we are considering, but was disputed, and not infrequently interrupted by plaintiffs and their grantors. "The use," says Wood in his *Law of Nuisances*, "must also be open, and as of right, and also peaceable; for if there is any act done by the other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use." (9 *Conn.*, 162; 1 *M. and W.*, 100; 3 *Nev. and Perry*, 257.)

Appellant Crafts further claims that he is entitled to the use of water not allowed him by the decree of the District Court, as riparian proprietor, by virtue of his ownership of the "See" and "Criswell" tracts. His right to these two places was deraigned at the trial from McDonald and Meacham, who had acquired title thereto as pre-emptioners and purchasers from the United States. The purchase from the Government of the "See" place was consummated Dec. 3, 1870, that of the "Criswell" tract on the twenty-seventh day of February, 1873. The Court below found that the *zanja*—the waters of which are in dispute—was an artificial conduit through which the waters of the natural stream had been appropriated by plaintiffs and their grantors long prior to the purchase from the Government of the "See" and "Criswell" tracts. The rights thus initiated and maintained by appropriation were confirmed by the Act of Congress "granting the right of way to ditch and canal owners over the public lands." That Act, passed July 26, 1866, conferred rights to waters appropriated for *agricultural* purposes. (*Bassey vs. Gallagher*, 20 *Wallace*, 670.)

It appears from the findings, that prior to the grant to the Lugos, of the

rancho, which includes within its boundaries both the lands owned by the appellants, Leffingwell and Byrne, and those at Cottonwood Row, owned by plaintiffs, the Mission authorities (who were agents of the Spanish and Mexican Governments) had conducted the waters from the natural stream to Cottonwood Row, and there employed them for purposes of irrigation; that this appropriation and use was continued by the Lugos until their conveyance to grantors of plaintiffs of lands at Cottonwood Row, and by plaintiffs or their grantors until after the purchase of the Lugos, title by appellants, Leffingwell and Byrne.

Doubtless while the title of the whole rancho remained in the Lugos they might have diverted the waters of the *zanja* anywhere within the boundaries of the rancho. But the Lugos, having continued the exclusive appropriation to the lands at Cottonwood Row until the sale and conveyance of such lands, the question arises, did not the exclusive use of the waters attach as appurtenant to the lands at Cottonwood Row, in such sense, that neither the Lugos nor their grantees of lands on the *zanja* above, could divert the waters or deprive the owners of Cottonwood Row of their accustomed use.

In *Lampman vs. Mills*, (21 N. Y., 505,) Denio, J., said: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold, with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. * * * No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale.

It has been said that the rule as adopted in *Nicholas vs. Chamberlain* is recognized fully by the Courts of this country. (*Wood's Law of Nuisances*, sec. 415.) In that case (*Cro. Jac.*, 121) it was laid down: "If one erects a house and builds a conduit thereto in another part of his lands, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, the conduit and pipes pass with the house, because it is necessary, *et quasi*, appendant thereto."

When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. "If the grantor has already treated this portion as a separate property, the mode in which he enjoyed it or suffered it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it." (*Phear on Waters*, 73.)

There can be little doubt that through the entire possession of the Lugos the waters were conducted through the *zanja* to Cottonwood Row, and for purposes of irrigation. The use of these waters, to the extent, at least, to which

they had been previously employed may have been, and it is fair to presume, was the chief, perhaps only inducement to the purchase by plaintiffs and their grantors. To authorize judiciously the diversion and material reduction of the waters would be a violation of the principle that they took with all the apparent benefits and easements belonging to their purchase. And in cases like the present the purchaser is entitled to the benefit of the easement without any express reservation or grant. (*Pyer vs. Carter*, 1 *H. & N. Exch. and Exch.*, Ch. 916.) The word "appurtenances" is not necessary to the conveyance of the easement. The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. The idea and definition of an easement to real estate granted is, a privilege off and beyond the local boundaries of the lands or tenement conveyed—in the present case, the privilege of conducting water through the lands retained by the Lugos, the common grantors of plaintiffs and defendants, by means of the *zanja*. (*Angell on Water Courses*, 153 a; 97 *Mass.*, 133; 4 *Gray*, 379.) The parties at Cottonwood Row having acquired their lands with the use of water, by means of the *zanja* attached, and *quasi* appurtenant to them, no subsequent act of their grantor could divest them of their right.

It is claimed by appellants, that inasmuch as the plaintiffs have alleged in their complaint that they are owners of the ditch and have not averred that they are in possession of it, *trespass* cannot be maintained. But the complaint also avers the existence of the easement. The Court below found the existence of the easement only, and this will support the decree.

In the plaintiff's answer to the cross-complaint there is an attempted denial of the adverse use by defendants, Leffingwell and Byrne. The case was tried in the District Court, upon the assumption that all the material allegations of the cross-complaint were denied. It has been repeatedly held by this Court that under such circumstances the point that a denial was insufficient could not be made here.

Upon the question of adverse use, continuous and uninterrupted by appellants, Leffingwell and Byrne, or by them and their grantors, for the period of five years, the District Court found against them. An examination of the transcript does not satisfy us that the finding was against the evidence.

Judgment and order affirmed.

We concur:

CROCKETT, J.
RHODES, J.
NILES, J.

THE *London Law Times* says; "It is already anticipated that the acquisition of England will open an improved field for the legal profession in the East. The Consular Court of Constantinople has cradled more than one excellent English lawyer and it is probable that in the future it will afford practice for a considerable bar." If England cannot supply the increased demand in Cyprus for lawyers, we are sure that the United States can.

Supreme Court Unwritten Opinions.

[July Term, 1878.]

[No. 8106. Decided Aug. 1, 1878.]

M. C. PLUMMER. Plaintiff and Appellant

vs.

DAVID ALEXANDER and MARTHA BROWN, Defendants and Respondents.

Appeal from the 17th District Court, Los Angeles County.
SEPULVEDA, Judge.

STATEMENT OF THE CASE.

Homestead claim—Injunction to restrain Sheriff from delivering tax deed.

Plaintiff alleges that on July 19th, 1875, she was the head of a family and resided on the $\frac{1}{4}$ section of land in contest situated in Los Angeles county, that on said day she filed her homestead declaration, that on April 12th, 1876, defendant Martha Brown filed a complaint against plaintiff and others for the survey of a certain piece of property. Judgment by default was taken therein June 13th, 1876 for \$226.10. On January 25th. 1877, the defendant Alexander, being then Sheriff of Los Angeles county, levied execution in pursuance of said judgment upon the land in controversy, and advertised the said land for sale under such execution on Jan, 30th 1877.

That on February 23d, 1877, plaintiff served notice on defendant, that said land was claimed by her as a homestead, that she then resided thereon and that her homestead claim was filed of record anterior to the rendition of the judgment above, that defendant was by said notice required to desist from advertising and selling such land; but on March 31st, 1877 defendant sold the land for \$145, and delivered a certificate of sale therefor. That on September 29th, 1877, plaintiff paid to defendant the amount of purchase money, percentage and all costs thereon due, under protest, being the last day for redemption from said sale—plaintiff at the time notifying defendant that she claimed the property as a homestead, and paid the redemption money under duress and to prevent a

deed from being executed by said defendant. Defendant in October 1877 re-advertised said land for sale under execution for the unpaid portion of said judgment. Plaintiff prayed for an injunction restraining said defendants from selling or in any manner interfering with said property,

An injunction was granted on November 15th, 1877. Defendant in answer made a general denial and stated that defendant Brown on June 13th, 1876 obtained a judgment for \$226.10 against plaintiff which became a lien on plaintiff's property, and on September 26th, 1876, sold the same to J. H. Smith and A. M. Stephens. On October 3d, 1877. Smith caused execution for \$189.73 to be issued and delivered the same to defendant Alexander to levy. On September 29th, 1877 plaintiff filed her homestead claim. That these defendants have no interest in the matters in controversy, that Smith is the real party in interest, as the assignee and owner of said judgment, that the land was plaintiff's separate property and was by her sold to E. R. Plummer subject to said judgment and that he is the real party in interest herein.

After argument before the Court, an order dismissing the injunction was made February 11th, 1878.

On Appeal the judgment and order was affirmed.

H. T. Hayward, attorney for appellant.

Thos. H. Smith, attorney for respondent.

[January Term, 1878.]

[No. 5119. Decided March 14, 1878.]

L. F. MOULTON, Plaintiff and Respondent,

VS

W. H. PARKS, ET AL., Defendants and Appellants.

Appeal from Tenth Judicial District Court, Colusa County.

P. W. KEYSER, Judge.

INJUNCTION.

STATEMENT OF THE CASE.

Plaintiff's complaint stated as follows: That plaintiff owns land on the east bank of the Sacramento River, in Colusa County, which partially overflows during the winter of every year. About two miles below plaintiff's land, on

the same side of the river, the defendants, on October 17, 1874, erected on their own land, a dam or levee across a basin of low land, through which runs a slough or creek. The effect of said dam has been and will be to raise the water higher, and cause it to remain longer on the plaintiff's land than it otherwise would. Plaintiff prays for \$1,000 damages, and perpetual injunction against the maintenance of the dam.

The answer, among other things, denies that defendants erected said dam, or that plaintiff has been injured thereby, and alleges that it was erected by Levee District No. 5, as authorized by Act of Legislature of March 25, 1868, and not otherwise. Admits that defendant, Parks, built said dam for said Levee District under special contract, and according to specifications expressed in said contract, and alleges that Parks had fully performed said contract, and had been discharged therefrom before any injury or damages resulted to the plaintiff from the work; and further alleges that on January 19, 1875 (six days after commencement of this action), said dam was abated.

The Court found these facts substantially as above stated, except that it found that the dam backed and held water on plaintiff's land from November 6, 1874, until January 19, 1875, when it broke. The Court further found that in the Spring of 1875, Swamp Land District No. 226 was formed in Sutter County, under the Act of March 28, 1868, of which Parks was a trustee. That the trustees of District No. 226 entered into a contract to repair said dam, and the dam was re-built, and has ever since been maintained and protected, and will be so continued, unless restrained.

On the above facts, judgment against defendants was given for \$469 damages and costs, and a perpetual injunction was granted.

Defendant's appeal is upon the judgment-roll from the final judgment and decree. Judgment affirmed.

Belcher & Belcher, and Vanclief & Cowden, attorneys for appellants.

Haymond & Hart, attorneys for respondents.

[No. 5061. Decided March 14, 1878.]

THE CITY AND COUNTY OF SAN FRANCISCO,
Appellant.

VS.

THE CITY GAS COMPANY, AND THE SAN FRANCISCO GAS LIGHT COMPANY, Respondents.

Appeal from the Fourth District Court, San Francisco County.

MORRISON, Judge.

FRANCHISE.—FORFEITURE.—DEMURREE.

The defendant, the City Gas Co., was incorporated for the purpose of availing itself of certain privileges set out in a franchise granted by Act of the Legislature. Subsequently the City Gas Co. and the San Francisco Gas Co. conso-

lidated. Suit was brought by the City and County of San Francisco against them to forfeit certain property set out in the complaint, in accordance with the Act of 1863.

Defendants filed a demurrer to the complaint, which was sustained.

Plaintiff appeals from the order sustaining the demurrer.

Appeal dismissed, and judgment affirmed.

W. C. Burnett, attorney for appellant.

R. P. & H. N. Clement, attorneys for respondents.

[No. 5767. Decided Feb. 26th, 1878.]

THOMAS KERNS, Plaintiff and Appellant,

vs.

P. F. DEAN, Defendant and Respondent.

Appeal from the Twentieth Judicial District Court, Santa

Cruz County,

BELDEN, Judge.

EJECTMENT.—NEW TRIAL.—ERROR.

STATEMENT OF THE CASE.

M. H. Patterson, owner of the premises in dispute, on October 25, 1867, entered into a contract with A. P. Sanford, by the terms of which Sanford was to pay the total sum of \$3,336, with interest at 10 per cent., at stated times and in stated amounts, in consideration whereof Patterson agreed, upon full payment, to execute to Sanford a conveyance to the tract in dispute. It was therein provided that if default should be made in any payments, Patterson might declare the rights of Sanford forfeited, by depositing a written notice with the County Recorder of Santa Cruz County, and re-enter and re-possess said premises. It was further provided that Sanford should have possession, pending such payments or forfeiture. Sanford entered into and kept possession under this agreement until his death, September 4, 1874. Sanford during that time made three payments, amounting to \$1,200. No other payments were made by him, nor have any been made since his death. On September 18, 1875, Patterson filed with the County Recorder a written notice, in accordance with the terms of the agreement, declaring Sanford's rights forfeited for non-payment of installments.

On September 20, 1875, Patterson entered into an agreement with the plaintiff, Kerns, by which he was to convey said tract to Kerns upon certain payments to be made by Kerns, and Kerns was to have immediate possession. Kerns entered into possession, and planted about 30 acres with grain.

In September, 1874, P. F. Dean was appointed administrator of Sanford's estate. Dean, on application, received a statement from Patterson's clerk to the effect that the estate of Sanford owed \$5,000 on the agreement. (This statement was made shortly before the declaration was filed declaring the con-

tract forfeited.) Dean made application for the statement, proposing to pay the balance due and secure said property to the estate. Dean brought action against Kerns for forcible entry, recovered judgment, dispossessed him and harvested the crop.

Plaintiff, Kerns, brings suit against Dean in ejectment and for damages.

Judgment was given plaintiff as prayed for, on December 8, 1876.

Defendant then moved for a new trial, which was granted. Plaintiff appeals from said order, and states error in the Court below in granting a new trial, alleging the insufficiency of defendant's special answer that there was no mutuality in the contract; that there was no description of the premises set out in the contract; and that the contract showing the time of payments to be made, and no performance being alleged, and no excuse for non-payment being given, the contract cannot be enforced.

Order granting new trial affirmed.

C. B. Younger, attorney for appellant.

J. A. Barham, attorney for respondent.

Book Notice.

SHORT STUDIES OF GREAT LAWYERS.—An elegant and very entertaining book of 382 pages, just from the Publishing House of the "Albany Law Journal," being a compilation of sketches of 21 characteristic if not representative men of the profession, originally published in the weekly numbers of the *Journal*, from the pen of Irvine Browne.

We pronounce every one well worth reading, and it would not be amiss to secure a copy at once, for the author, in his preface, earnestly promises "not to do so again."—Price \$2.00
Issued July 19th, 1888.

OHIO STATE REPORTS.—We have again received from the Law Publishing House of Robert Clarke & Co., Cincinnati, Ohio, two more parts of the *advance sheets* of the "Ohio State Reports :"—Part 5. of Vol. 30, by the Supreme Court Commission; and part 4. of Vol. 31,—of nearly 200 pages each, and executed in the superior style for which that House is so deservedly noted.

Vol. 30. must now be nearly completed—already 640 pages—price to be \$2.50 per Vol. Binding \$1.00.

Supreme Court of the United States.

HUNTINGTON, appellant, vs. NATIONAL SAVINGS BANK.

OWNERSHIP OF SURPLUS IN SAVINGS BANKS. Plaintiff and others were incorporated as a savings bank by a charter which provided that the bank should receive deposits, and that the income "of all deposits should be divided among the depositors according to the terms of interest stipulated." There was no capital stock, but the bank was required to file a bond for \$200,000 to secure the deposits. *Held*, that the corporators had no claim to the profits made by the bank, and could not ask for an accounting thereof.

Appeal from the Supreme Court of the District of Columbia. The action was brought for an accounting, by Fanny A. Huntington, administratrix, and Frank H. Gassaway, administrator of W. S. Huntington deceased, against the National Savings Bank of the District of Columbia. The opinion states the facts.

Mr. Justice Strong delivered the opinion of the court.

The bill of the complainants assumes that as personal representatives of William S. Huntington, deceased, they have an equitable ownership of one-sixteenth part of the franchises, property and privileges of the defendant corporation, and that, as such representatives, they are entitled to call for an account of the profits made, and to demand payment to them of one-sixteenth part of the value of the franchises and property as well as profits. Whether this assumption is well founded or not—whether the estate of their intestate has any pecuniary interest in the corporate franchise and property can be determined only after a careful examination of the defendant's charter. The corporation was created by an act of Congress approved May 24th, 1870, entitled "An act to incorporate the National Union Savings Bank of the District of Columbia." By that act George H. Plant, William S. Huntington, and fourteen other persons named and their successors were declared to be a body politic and corporate under the corporate name mentioned, having succession, capable of suing and being sued, of having a common seal, and generally of doing and performing all things relative to the object of the

institution, lawful for any individual or body politic or corporate to do.

The object of the institution was declared in the 4th section. By that it was enacted that the "corporation may receive on deposit, for the use and benefit of the depositors, all sums of money offered for that purpose," and invest the same in the manner therein described. The section then adding: "The income or interest of all deposits shall be divided among the depositors or their legal representatives, according to the terms of interest stipulated."

The 8th section required an annual report to be made to Congress, specifying the number of depositors, total number of deposits, amount invested in bank stock and deposited in bank on interest, amount secured by bank stock, amount invested in public funds, loans on mortgage of real estate, loans on personal securities, amount of cash on hand, total dividends of the year, and annual expenses of the institution, all of which to be certified and sworn to by the treasurer and five managers or more.

Section 9 required the books of the corporation, at all times during their hours of business, to be kept open for the inspection and examination of the comptroller of the currency or depositors.

The 11th section enacted that the corporation should file with the clerk of the Supreme Court of the District a bond with security in the penal sum of \$200,000, approved by one of the judges of the Court, conditioned to pay to every depositor or person entitled such sum as the party may be entitled to, within thirty days after such deposit shall be demanded, which bond might be sued by any depositor or person entitled, after such demand and refusal to pay.

Other provisions of the act require the officers of the corporation to give security and take an oath for the faithful discharge of their duties, and forbid any officer, director, or committee charged with the duty of investing the deposits to borrow any portion thereof or use the same except in paying expenses of the corporation.

These are all the provisions that have any relation to the question we are considering. It is to be noticed that the charter does not authorize the creation of any corporate stock or capital, nor does it contemplate the existence of any other than the deposits which may be made. The corporators are not required to contribute anything. There are of consequence no shareholders. Not a word is said in the instrument respecting any dividends of capital or even of profits to others than the depositors. Certainly no express authority is given to make dividends to the corporators, and we discover nothing from which such authority can be inferred. The dividends of which a return is required by the 8th section to be made to Congress are evidently those spoken of in the 4th, as made to the depositors. The rules to be applied to the construction of corporate grants are well known. A corporation created by statute can exercise no powers and has no rights except such as are expressly given or necessarily implied. In this case, so far from there being an implication of any pecuniary interest in the corporators or any duty due to them from the corporation, the contrary is expressly declared. The institution, having no capital stock, whatever liability, if any there may be to the corporators, must be satisfied out of the profits made from the deposits. But the charter, when conferring the power to receive money on deposit, limits it to receiving for "the use and benefit of the depositors," and directs how it may be invested. It further declares that "the income or interest of *all* deposits shall be divided among the depositors or their legal representatives," not among the depositors and the corporators. It is true the income or interest is to be divided among the depositors, "according to the terms of interest stipulated," implying perhaps, that the dividend may be less than the interest received by the corporation, but there is nothing in the charter that indicates the excess is for the benefit of the corporators. It is to provide for the necessary expenses of the institution authorized to be paid, and perhaps to raise a contingent fund to meet possible losses.

During the argument our attention was called to the 11th

section of the charter, which requires the corporation to file a bond with security, in the penal sum of \$200,000, conditioned to pay and satisfy depositors, and it is argued that this bond may be considered as capital contributed by the corporators named in the charter, and hence we are asked to infer that they have a pecuniary interest which entitles them to a division of the the profits, as also to a share of the capital, and to a beneficial interest in the franchise. If this were so, the complainants' bill does not aver that William S. Huntington was one of the obligors in the bond, or that he was even in that mode one of the contributors to capital stock. But if it be assumed that he was, it would still be true that the bond was in no sense capital owned by the corporation or by the corporators. It was required by the charter solely for the security of the depositors or creditors of the institution. The corporation was required to give the bond with security, but what the security should be was left to the approval of a judge of the Supreme Court of the District. There was no requirement that the corporators should sign the bond, much less that all of them should. The security might have been given by strangers exclusively, or by one or more of the corporators. If given by the latter the obligors would have been bound, not as corporators, but as any other persons having no connection with the institution.

We think the complainants have mistaken the nature of the corporation. It is not a commercial partnership nor is it an artificial being, the members of which have property interests in it. Nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depositary for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as church wardens for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage without any interest in its members. The title of the act incorporating it indicates its purpose, namely, an act to incorporate a national

savings bank, and the only powers given to it were those we have mentioned, powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives. It is like many other savings institutions incorporated in England and in this country during the last sixty years, intended only for provident investment, in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are quasi benevolent and most useful because they hold out no encouragement to speculative dealing or commercial trading. This was the original idea of savings banks. Scratchley's *Treatise on Savings Banks*, *passim*; Grant's *Law of Banker's* 571, where, in defining savings banks, it is said the bank derives no benefit whatever from any deposit or the produce thereof. Such are savings banks in England, under the statutes of Geo. 4, ch. 92, § 2, and 26 and 27 Vict., ch. 87. Very many exist in this country. Among the earliest are some in Massachusetts, organized under a general law passed in 1834, which contained a provision like the one in the act of Congress, that the income or profit of all deposits shall be divided among the depositors, with just deduction of reasonable expenses. They exist also in New York, Pennsylvania, Maine, Connecticut and other States. Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors in dividends or in a reserved surplus for their greater security. Such very plainly, is the defendant corporation in this case. The complainants have therefore, no pecuniary interest in it, and no right to the relief they ask.

The decree of the Supreme Court of the District dismissing the complainants' bill is affirmed with costs.

New York Supreme Court.

SAMUEL V. MILLER, appellant, vs. ARTHUR O'KAIN
respondent.

Proceedings in bankruptcy are not determined, within the meaning of § 5105, U. S. R. S., as amended in 1874, until an order to the effect has been entered in the Bankrupt Court.

A surety for the bankrupt, who has paid the claim after proof thereof, is subrogated to the position of the original creditor as to its enforcement by suit.

Appeal from judgment for defendant, entered on nonsuit directed by the Court.

Action upon a promissory note given by defendant to plaintiff, and also for moneys paid by plaintiff on account of a note which he had signed as surety for defendant.

On the 7th of February, 1872, defendant was adjudicated bankrupt. Plaintiff duly proved his note in the bankruptcy proceedings, and the holder of the note upon which plaintiff was surety also duly proved his note. Plaintiff, as such surety after such proof, paid the amount of such note, and the same was delivered to him.

Afterwards, and in February, 1873, the assignee in bankruptcy declared a dividend to the creditors who had proved their claims, and paid the amount of the dividends upon the two notes plaintiffs, who accepted the same.

After payment of said dividends, and before the commencement of this action, the assignee rendered his accounts to the register, and was discharged. No further proceedings have since been had in the bankruptcy case by or in behalf of the bankrupt or any creditor.

The Court held that plaintiff, by proving the note held by him, is to be deemed to have waived all right of action thereon until such time as the proceedings in bankruptcy are determined; that the holder of the other note, by proving the same, had likewise waived all right of action thereon in like manner; and that plaintiff, by paying the amount thereof to said holder and acceptance of the dividend thereon, elected to stand in the place of said holder, and was precluded from

bringing suit for the money paid by him until the determination of the bankruptcy proceedings, and that such proceedings were not fully determined at the time of the commencement of this action.

Held, No error; that the proceedings in bankruptcy could not be considered determined under § 5105, as amended by the Act of 1874, until some order of the Court in Bankruptcy had been made declaring the proceedings to be determined. 10 Hun, 362. As to proceedings in bankruptcy in the Northern District of New York, we suppose a special order in each case would be necessary in order to bring the proceedings in bankruptcy to a close, so that the suspension of a right to sue, which results from the proof of the debt in bankruptcy, while the creditor is desirous of using the same as a cause of action, may be brought to an end. This probably should be on notice to the bankrupt, and on that motion both the bankrupt and the creditor can be heard.

As to the second note, plaintiff claimed that the debt was not proved by him, and consequently there is no suspension of the right of action.

Held, That under § 5070 of the Revised Statutes, if the creditor has proved the debt against the bankrupt, the surety who shall have paid the debt after that time is subrogated to the position of the original creditor as to the proof, the dividends, and the claim or debt. Plaintiff received the dividend, which he could not have done unless the debt had been proved in bankruptcy. He cannot be permitted to avail himself of the proof of the debt for the purpose of receiving the dividends and repudiate it so far as it operates to create a suspension of his right to sue on the demand.

Judgment affirmed.

Opinion by *Talcott, J.*

Recent U. S. Land Decisions.

In the matter of the official survey of the rancho Laguna de Los Palas Colorados the heirs and representatives of Joaquin Morago and Juan Bernal, executed by Boardman in 1875, approved by the Surveyor-General on December 20th, 1877, the Secretary, upon exceptions taken by Vandyke & Wells and Mullan & Hyde, counsel for the protestant, to the decision of the Commissioner, have decided in favor of the confirmees upon all points, refusing to entertain the appeal, and holding the Boardman survey good. This grant having been confirmed in default of appeal, by the District Court in 1858, the first survey, known as the La Croye survey, was made. Objections were filed, and notice given to all parties interested, who appeared and were made parties, and default was entered against those who did not appear. After various stipulations were made the District Court rejected the La Croye survey, and the Boardman survey was made at its order. Certain settlers within the exterior limits of the tract from which three square leagues (Spanish) were selected by the confirmers, appeared before Commissioner Williamson on appeal from the Surveyor-General's approval of the Boardman survey. Among other points not at issue in the appeal, the Commissioner held that all parties not parties to the proceedings in Court have no standing except as protestants, and are not entitled to appeal; that the Boardman survey was correct; that the land confirmed was three Mexican and not English or American leagues. The Secretary holds that as the lands within the claimed limits of the grant were absolutely reserved from settlement, he is not enabled to see by what right the protestants can claim to have any standing in this case. They settled on lands reserved by law, and being presumed to know the law, have no just ground for complaint. The fact is clearly established that the southern boundary of this grant is south of the southern extremity of the Boardman survey, and the Secretary finds no error in the

survey of this boundary, and pronounces the Boardman survey as made substantial and in conformity to the decree of the district and civil Courts. It will be remembered that the western boundary of this ranch adjoins the rancho San Antonio on which Oakland is built.

WASHINGTON, August 13th—Commissioner Williamson has just made a decision in which the question of pre-emption rights upon school sections of land in California is involved. One Henry Meta, on January 2d, 1878, made application under the Pre-emption law for a quarter section of land in one of the townships in the Sacramento District. His affidavit, which accompanies the application, shows that he had been on the land twenty-one years, and prior to the survey of the land and had made expensive improvements upon it. Having deferred making his application beyond the year of the survey within which the law seems to require it to be filed, the Register and Receiver of the Sacramento Land Office rejected the claim, and an appeal was taken to the General Land Office. Commissioner Williamson reviews the facts in the case and the laws bearing on the subject, and reaches the following conclusion: "That he deferred making his application for so long a time after his settlement and survey cannot, in my opinion, affect his present right. The delay was of course made at his peril, but in the absence of any intervening right or claim his application must be allowed, provided he has in other respects complied with the law. This it appears he has done. You will therefore reverse your decision and allow the application. The fact that the State has sold the land, if such be the fact, can have no bearing upon this case."

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UNITED STATES SUPREME COURT
ABSTRACT.

JURISDICTION.

1. Of United States Circuit Court suit by creditor of bank against stockholders.—A citizen of Virginia sued the stockholders of a bank incorporated under the laws of South Carolina in the United States Circuit Court to enforce the statutory liability of the stockholders for the debts of the bank. The bank was not made a party and there was no evidence of the citizenship of the stockholders sued. *Held*, that the Circuit Court had no jurisdiction of the action. Decree of Circuit Court, South Carolina, reversed.

Godfrey, receiver, appellant, v. Terry. Opinion by Miller, J.

2. Constitutional law: impairing obligation of contract.—A State cannot legalize the suspension of specie payments by banks incorporated under its laws. *Ib*.

MUNICIPAL BONDS.

City issuing, bound by recitals in as to bona fide holder.—Under a statute of Texas a city issued its bonds which contained a recital that they were issued in accordance with the provisions of the statute. *Held*, that the city as against a bona fide holder for value and without notice was estopped by the recital from denying the regularity of the issue of the bonds. Judgment of U. S. Circ. Ct., W. D., Texas, affirmed.

City of San Antonio v. Mehaffy. Opinion by Swayne, J.

EASTING'S LAW DEPARTMENT.

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MOOT COURTS, ETC.

A Moot Court will be established for the argument of causes and the discussion of legal questions by members of all the classes. It is hoped that the students will also form debating societies or clubs.

The Senior Class will have constant exercises in the preparation of Pleadings, and other legal papers and written instruments of all kinds.

JOHN NORTON POMEROY, LL. D.

PROFESSOR OF MUNICIPAL LAW.

The CALIFORNIA LEGAL RECORD is a full and complete continuance—and the only one—of the publication of the *California Supreme Court decisions* from the close of the "San Francisco Law Journal," vol. 1., and will contain every decision rendered since the close of that volume, on February 23, 1878,—as rapidly and soon as time and space will permit.

There have also been added twelve decisions omitted from that work through the neglect of its former editor. We have nothing further to do with the "Pacific Coast Law Journal," nor has it any connection with us or this office.

F. A. SCOFFIELD & Co.,
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CALIFORNIA LEGAL RECORD.

Vol. I

SATURDAY, YUGUST 24, 1878.

No. 21

Legal Notes.

A REMARKABLE TRIAL.

A Wife and Mother Procures a Decision Annulding Her Marriage.

Probably the most remarkable case ever tried in this county, and one that has perhaps attracted more attention and excited more comment than any other, was that of Flora A. Spurlock vs. Charles W. Green for annulment of marriage contract. We cannot learn that the case has any precedent in this State. The complainant is the daughter of Rev. M. Spurlock, a Methodist preacher now stationed at Kewanee, and formerly at Geneseo, and the defendant is a Methodist minister stationed at Fairview, Fulton county. The parties were married about two years ago, and lived together as man and wife, having one child born to them, now nine months old. For some time past complainant has not lived with defendant, and recently she brought suit for annulment of the marriage contract on the ground that she had entered into it under duress of her mother, and against her choice and protest. This she swore on the witness stand, testifying that she had never loved the defendant, and had not willingly married him; and that he was and always had been repugnant to her; that her parents had all of the time known this; but they had persisted that she must marry him, and her mother had watched and guarded her to that end; that her letters to Green had been written or dictated by her mother, and filled with expressions of affection that she could not voluntarily make; that she had loved another man and had pleaded against this marriage, and had prayed for death and contemplated destruction rather than submit to it; and, finally, being wearied out and worn and distracted, had submitted herself an unwilling partner to the marriage ceremony, but did not consider in spirit that she was ever married to Green.

Mrs. Spurlock, the mother of the girl, appearing as a witness for her, fully corroborated this testimony in all essential particulars, astounding the crowd of spectators by solemnly avowing in all its particularity her own part of this extraordinary business, and pleading a belief that she was doing right and securing her daughter's happiness and well-being. The popular impression left by such testimony was in the highest degree unfavorable, and there is not heard anywhere any dissent from that impression.

After the submission of this and other corroborative evidence, the defense consented to a verdict. Mr. Green testified that he had never known of the facts testified to by the mother and daughter, and that he had no desire to hold an unwilling wife, and only wished to guard his own honor and reputation from a reproach that he did not merit. Accordingly, a verdict was rendered annulling the marriage and declaring it void—that is, that the marriage had never existed; the parties in law were not husband and wife when they had lived together, and that the child was not born in lawful wedlock. That such a decree should be desired seems to us almost as incredible as that a mother should have thought she was pursuing a righteous course in compelling her daughter in a marriage that she loathed.—*Cambridge, IU, Chronicle.*

The Lights and Shades of a Book Contract.

Judge Wheeler of the Nineteenth District Court to-day rendered a decision in the suit of A. L. Bancroft & Co. vs. W. W. Call. The Judge explained how the defendant got in the case. An author, ambitious to write a book descriptive of the Lights and Shades of San Francisco, went to Bancroft & Co. to get the work published, but the publishers having some doubts about the pecuniary resources of the author declined to go on with the work, unless security was given for payment. About this time W. W. Call agreed to become responsible for \$1,500, and the publishers also receive the right of collecting \$1,000 from persons who had subscribed for copies of the book. In order to make everything clear, Bancroft & Co. wrote to Mr. Call at Yosemite informing him that his payment of \$1,500 would be the last installment, and would be collected after the subscriptions were paid. Mr. McCall replied giving his assent to that arrangement and the publishers went to work.

There was a common understanding that the book should be ready for delivery August 1, 1878; but it was delayed and all the copies were not delivered until March, 1877. The court said the main point involved was whether the guarantor is released on account the Publishers failed to finish the work and deliver the books August 1, 1878. On this point it was decided that mere delay would not release the guarantor unless it was unreasonable. The case, however, was taken out of that dilemma by the defendant going to Bancroft & Co. after the 1st of August, 1876, and requesting the delivery of the books to the author. The court supposed the real difficulty was that the book did not reach the popularity which the author hoped it would attain. Judgment in accordance with the prayer of the complaint for \$1,500 in gold coin and interest was ordered.—*Baldwin, August 1864.*

THE WATER QUESTION IN THE SUPREME COURT.—The Feather River Water Company have been permitted to intervene in the Supreme Court in the case of David Mahoney vs. Board of Supervisors. A motion by Mahoney's attorney to dismiss the intervention was denied on Monday by said Court. Upon motion of Mr. Irvine, attorney for Mahoney, the case went over until August 16th. Among those present in Court watching the proceedings were J. P. Hoge, Delos Lake, J. M. Burnett, C. N. Fox (attorney for Spring Valley), Water Commissioner Murphy, J. C. Maynard, David Mahoney and others.

The Court has determined to grant the greatest latitude in examining the merits of the law and the acts of the Water Commissioners thereunder. *Bulletin, August 13th.*

STARTLING SCENE IN COURT.

A Frantic Mother Comes to recover a Child She had previously abandoned to its Fate.

The *habeas corpus* case of James and Ellen Lane vs. Wm. H. and Mary Taylor was heard Monday afternoon in the Fifteenth District Court. The plaintiffs claim to be the parents of Ellen Lane, otherwise known as Mary Taylor, nine years of age, the adopted daughter of the defendants, who reside at Vallejo, and the writ was sued out to obtain possession of the child.

Mrs. Lane testified that on the 7th of February, 1876, her husband being sick and poor, she placed the child, then an infant 7 months old, in St. Joseph's Orphan Asylum, giving it her maiden name of Mary Ellen McLoughlin. She agreed to pay \$15 per month for its support, but not having the money to pay, she neglected to call and see her offspring. In 1876 she and her husband having accumulated some money, took a trip to Ireland. About a year ago they returned, quoted up the child and found her domiciled with the Taylor family, who, having formed a strong attachment for the girl, refused to give her up. James Lane corroborated the testimony of his wife.

William H. Taylor stated that he was employed at Mare Island, and was abundantly able to take care of his adopted daughter. She had a good home, and was sent to school. Mrs. Taylor verified the statement of her husband.

Father Lewis testified to the good character of Mr. and Mrs. Taylor, and said that the Lanes had made gross misrepresentations to him, entirely destroying all the sympathy he entertained for them.

A deputation from the Asylum was introduced, showing that the child had been placed there as a half orphan, and that Mr. and Mrs. Taylor had been regularly entrusted with her care.

The little girl said she preferred to remain with her papa and mamma Taylor.

Judge Dwinnelle said that the case showed one of the most heartless instances of parental desertion which had ever been brought to his Court. In justice to Mr. he must remand the child to the custody of Mr. and Mrs. Taylor.

As the words fell from the lips of the Court Mrs. Lane rushed frantically towards the child, overturning chairs in her course. Mrs. Taylor placed

herself before the child to protect it. The spectators jumped to their feet, and a scene of confusion ensued. The Court commanded order, but the words of the Judge were unheeded. Mrs. Lane screamed, and wept, and declared that her child should not be torn from her. The Sheriff was ordered to remove the woman from the room. She shrieked and struggled so violently that the officer's efforts were unsuccessful. The intervention of her attorney only soothed her a little more. Finally the Sheriff and others held her while Mr. and Mrs. Taylor and their adopted child left the court-room. All this time Mr. Lane appeared perfectly indifferent to the scene going on around him, not making the slightest attempt to calm his agitated wife. It was some time before she could be sufficiently quieted to leave the court-room. *Bulletin, August 30th.*

A PROULIAR ANSWER.—Motion for judgment on the pleadings was denied by Judge Thornton yesterday in the case of W. C. Tyler vs. Maggie Barkley, action to recover \$1,200 on a promissory note executed by the defendant on the 11th of September, 1876, in favor of Maria E. Avery, and by her assigned to plaintiff. The answer is singularly drawn. The defendant denies upon her best knowledge, information and belief that she executed the note, and avers upon information and belief that the note is a forgery. She further alleges that the reason she places her denial upon information and belief is that she did, on or about the 15th of September, 1876, execute a note to Maria E. Avery in payment for certain furniture then belonging to said Avery, and said Avery agreed to execute and deliver to defendant a bill of sale of said furniture, which she neglected to do, and on the same day said note was executed said Avery informed the defendant that she had sold said furniture to the plaintiff, W. C. Tyler, and had torn up the note. That if the note said upon is the note so executed by the defendant, then the same was without consideration, the indorsement to plaintiff was without consideration, and plaintiff took said note with full knowledge of the facts. Wherefore defendant demands to be herein dismissed, etc. *Bulletin, August 16th.*

INTERESTING TO PARDONED CRIMINALS.

The Iowa Supreme Court has decided a very interesting case touching the legality of a conditional pardon. Kirkwood pardoned one Dick Arthur on condition that he keep sober and refrain from crime. Arthur violated the condition, was rearrested, released on *habeas corpus* by Judge Newman. Gov. Newbold appealed to the Supreme Court which now holds that a conditional pardon can be issued, and, if accepted by the convict and violated, the unexpired sentence enforced. This is the first time the highest court has passed upon this question. Johnson County had such a case with Hockenberry, who was conditionally pardoned, and afterwards, upon proof of violation, was made to serve out his term.

The Safe Deposit Company Held Responsible for Duncan's Overturn of Its Stock.

An important decision was rendered by Judge Dwinelle last week, in the case of F. H. Woods vs. the Safe Deposit Company. Plaintiff loaned J. C. Duncan \$20,000, on his promissory note, taking as security therefor two certificates representing 500 shares each of stock of the Safe Deposit Company, made out in the usual form duly executed by the Company officers with the Company seal attached. Subsequently Woods discovered that Duncan did not at the time own more than 500 shares and that one of the certificates was fraudulently issued, and he brought suit to recover \$10,000 or one-half the amount loaned Duncan, on the ground that the Company was bound by the acts of its agents.

The Company demurred to the complaint on the grounds that it did not state a cause of action, and that Duncan and the Secretary of the corporation should have been joined as defendants.

Judge Dwinelle held that the complaint does state a cause of action, and to a great extent he based his opinion upon decisions of the Court of Appeals of New York, citing the case of the New York and New Haven Railroad Company vs. Schuyler and others, which hold that a corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts and omissions; and is responsible for the acts and for the negligence of its agents while engaged in the business of their agency to the same extent and under the same circumstances as natural persons. Where the authority of an agent depends upon some party outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representations of the agent, although false as to the existence of such fact. This case cited in parallel with the one decided by Judge Dwinelle. The New York and New Haven Railroad Company were held to be liable for damages occasioned by the over issue of stock, fraudulently made by their stock agent, Schuyler. That a corporation, in law, is but an individual, and bound by the same rules and laws as human beings, and cannot hide its wrongful acts and omissions behind its secretary or other agent. The same principle is announced by the Chancellor of Kentucky, in the Bank of Kentucky vs. the Schuyler Bank, and by the Courts of other States.

It was also held by Judge Dwinelle that it was not necessary to name Duncan or the Secretary of the Company parties to the action.—*Bulletin, August 22d.*

RECOGNITION OF ADOPTION BY WILL.—Letters of administration upon the estate of John C. Keenan have been granted to James I. Felton. The Public Administrator and two other persons, representing legatees under the testator's will, also applied for letters. Felton was the nominee of an adopted son, George B. Keenan. There was no evidence of the adoption of the latter by the testator except a clause in the will where he speaks of him as "my adopted son, George B. Keenan," and the point in controversy was, do the statements in the will that he was the adopted son of the testator afford *prima facie* evidence of the adoption? The Supreme court of this State having held that a statement in a will as to

parentage by birth may be received as *prima facie* evidence, Judge Murrick applied the rule in this case.—*Bulletin, August 22d.*

DELINQUENT TAX CASES.—In pending to-day upon the demurrer to the complaint in the case of the City and County of San Francisco vs. J. Keane, involving \$44, one of the several hundred actions brought by Fisher Ames, as special counsel for the city, to recover delinquent taxes for the twenty-fourth fiscal year, Judge Thornton said that the complaint sets forth every fact required for the levying and collecting of taxes under the general law. One of the points of the demurrer is that the action is barred by the statute of limitation. In the opinion of the Court the action was not barred, nor did he think such an action could be barred except by direct statute. The demurrer was therefore overruled with ten days to answer.

In the two cases of the people of the State of California vs. The Horner Savings and Loan Society, actions to recover taxes delinquent for the twenty-fourth fiscal year, one for \$770, on money and office furniture; the other for \$640 on the lot corner of Power and Montgomery streets, Judge Thornton said the complaints were demurred to on the general ground that they did not state causes of action. He held that the complaint stated all the necessary facts. It was also demurred to on the ground that the action of the State Board of Equalization was illegal. He said that the State law steered clear of all acts of the Board. The Supreme Court had held that the law was constitutional, and the demurrers would therefore be overruled.—*Bulletin, August 22d.*

The Monetary Conference in Paris.

PARIS, August 22d.—In the International Monetary Conference to-day, Walker, of the American Delegation, made a long speech, pointing out the serious consequences of demoralizing silver. Burton also addressed the conference. He replied to the accusation that the United States came to the Congress with antiquated theories which were only supported by nations having a forced paper currency. He said the point to be ascertained was, whether the Powers considered it advantageous to concert together upon the conditions of their silver currency. The question was then raised whether the Conference should again adjourn. Governor Fenton declared there had never been a more important question than that under discussion. American delegates had crossed the ocean to discuss it exhaustively. It would be greatly to be regretted if this were not done. American delegates had still many things to say. The Conference adjourned for one week.

Leon Say announced that Germany had declined, with thanks, an invitation to participate in the Congress. Mr. Walker argues that a gold standard was condemned by experience of the last few years. The Conference of 1866 committed a great mistake in proclaiming a crusade against silver for the sake of international coinage. Only two or three countries were able to maintain a sufficient gold circulation, and others would be driven to circulation in which silver would predominate below its nominal value. The Swiss and Swiss Representatives dispute Walker's argument.

SUPREME COURT DECISIONS.

[From the DAILY BULLETIN, Aug. 19th.]

ATTACHEMENTS are now complete by which all the decisions of the Supreme Court of California—both the written opinions and the oral decisions—will hereafter be published in the *Daily Evening Bulletin*, with appropriate "statements of facts" and "Syllabus," as soon as rendered and filed, thus making a full and complete record of decisions, pending the publication of the *California Reports*. For those who should desire to afterward obtain or preserve them in form for binding—with contents, index, etc.—they will be compiled weekly and supplied in the *California Legal Record* by F. A. Schofield & Co.

JULY TERM, 1878.

CONTEMPT OF COURT, AND PUNISHMENT. Proceedings for contempt, and its punishment, are as applicable to the *Probate* as to the *District Courts*. A review under a writ of *Certiorari* only extends to whether the Court regularly possessed its authority. The settlement of an estate is not a civil action; and an executor is not only a *trustee*, but in one sense an *officer of the Court*, and hence is subject to attachment for contempt.

BY THE COURT.

[Filed August 17, 1878.]

EX PARTE WILLIAM SMITH—No. 6048.

The provisions of section 138 of the Code of Civil Procedure, respecting the incidental powers of Courts, and of section 1809 and following, defining contempts and providing for their punishment, are as applicable to the *Probate* as to the *District Courts*. Among the powers enumerated in section 138, is the power of Courts to compel obedience to their judgments, orders and process. The fifth subdivision of section 139 declares that disobedience of any lawful judgment, order or process of a Court is a contempt of the authority of the Court; and other sections of that article provide for the punishment of contempts.

The order which the petitioner disobeyed is the order of final distribution of the estate of R. D. Taylor, deceased, the petitioner being one of the executors of the last will and testament of said deceased; and this comes within the fifth subdivision of section 1809, above cited.

It being admitted that the Court had acquired jurisdiction of the proceedings instituted for the purpose of enforcing obedience to the order, its decision upon the facts tendered in those proceedings is final, and alleged errors therein occurring, are not the subjects of review under writs. The review extends only to the question whether the Probate Court regularly pursued its authority. That Court having determined that the petitioner was guilty of disobedience of the order of final distribution, the only question remaining for consideration, is whether the Court had authority to enforce obedience to the order of distribution, by ordering the petitioner to be imprisoned for contempt until he should obey said order.

It is manifest that the proceedings for the settlement of the estate of Taylor deceased are not a civil action, within the meaning of section 18, Article I of the Constitution; nor is the amount of the money, which by the order of distribution, the executors are required to pay over to the distributees a debt due from the executors to the distributees; and therefore the case does not fall within the clause of that section of the Constitution, inhib-

iting imprisonment for debt in a civil action. The Code does not provide for the issuing of an execution for the enforcement of an order of distribution; and it is apparent that in many cases such a remedy would be wholly inadequate. The executor holds the property of the estate in trust for the creditors and heirs and others interested in the estate, and as such trustees their obedience to the orders of the Probate Court may be compelled by proceedings for contempt, as fully as the same may be done by the District Court in the execution of a trust of which it has cognizance. A further and perhaps stronger argument in support of the proceedings in this cause may be deduced from the relation which the petitioner bears to the Probate Court. An executor, although holding the assets of the estate in trust, as above stated, is not merely a trustee, but is in one sense an officer of the court. The Court makes and may revoke his appointment, and usually all his acts are performed under or subject to the direction of the Court, and have no validty until the Court gives its approval. In respect to those matters in which he acts only under the direction and subject to the approval of the Court, he may be regarded as an officer of the Court, and no argument is needed to show that as an officer, his obedience to the orders of the Court may be enforced by attachment for contempt.

Questions in respect to the release of the executor from the obligation to comply with the order, or his inability to comply with it, cannot be considered under this writ. Writ dismissed.

Unwritten Decisions.

[Decided August 13, 1878.]

DAVID A. HUDSON, ADMINISTRATOR OF THE ESTATE OF MARTIN HUDSON, DECEASED,

No. 6118.

JAMES IRWIN AND SAM'L HUTCHINSON.

Appeal from seventh (now Twenty-second) District Court, Sonoma county—W. C. Wallace, Judge.

ACTION TO QUIET TITLE.—A new trial will not be granted if some evidence supports the verdict.

STATEMENT OF THE CASE.

This was an action in equity, brought by the plaintiff on January 30th, 1878, to quiet title to certain lands in Sonoma county, being a part of the "Guilices Rancho," which it is claimed Martin Hudson held in fee simple at his death on December 14th, 1871. The defendant's answer set forth their ownership in fee simple of 745 acres of the said lands by conveyances from the Mexican Government, and the said W. Hood, the patentee from the United States Government.

The cause was tried May 18, 1878, by jury, and verdict for the defendants—the main question being upon the evidence regarding the proper survey of the land.

Plaintiff moved for a new trial on the ground of insufficient evidence, and with a statement of the case. This was denied February 20, 1878, and plaintiff appealed from the order overruling that motion.

That order is now affirmed.

Thomas and Pringle, attorneys for plaintiff and appellant; McCullough and Meekin, and Height and Taylor, attorneys for defendants and respondents.

(NOTE.—This cause had been previously tried and judgment rendered for plaintiff, from which the defendants appealed, and upon which the judgment was reversed, as is fully reported in 80 Cal., 454.)

Unwritten Decisions.

[Decided August 18, 1878.]

CHAR. B. YOUNG,

vs.

CITY AND COUNTY OF SAN FRANCISCO. } No. 1568.

Appeal from the Twelfth District Court, San Francisco, Daingerfield, Judge.

LEASE OF WATER LOTS.—Is the Statute of Limitations a valid defense?

STATEMENT OF THE CASE.

Plaintiff charges that in June, 1856, the defendant sold at public auction leases of certain water lots and other property, under what purported to be a good and valid ordinance of the city, upon which the plaintiff, relying, bid for the same for a specified term of years, and paid defendant on them \$14,918 94. Further, that defendant had no possession of the property sold, and did not give it over to plaintiff, and plaintiff never enjoyed possession, or rents or income, or any kind. Plaintiff demanded on November 24, 1876, execution of said leases, as purchased, which defendant refused. He then demanded, on November 23, 1876, the repayment of the said purchase money, with interest from date of sale. And further, that said precedent ordinance under which the sales were made, was void, and defendant, had no title, and no authority to sell; hence the money paid was held in trust, subject to return on demand, which he now demands. Defendant denies the complaint and pleads the Statute of Limitations as a bar to the claim. Cause was tried April 24th, 1876—July waived—and judgment rendered for defendant with costs. Plaintiff moved for a new trial, on the ground that the sale was a fraudulent one, and hence the Statute of Limitations was erroneously held to apply, and that suit was brought within six months after his discovery of the fraud. Motion denied and appeal taken by plaintiff from the judgment and order, on December 15, 1876. Judgment and order now affirmed. J. S. Hart, attorney for plaintiff; W. C. Burnett, attorney for defendant.

Unwritten Decisions.

[Decided August 1, 1878.]

Matter of the estate of David Gharky, deceased.

DAVID GHARKY

vs.

JOHN WARNER, ET AL.

} No. 6064.

Appeal from Probate Court of Santa Cruz county.

A. CRAIG, Judge.

CONTENT OF WILL.—HABITUAL INTemperance.—IN-SANE PREJUDICE.—STATEMENT OF THE CASE.

John Werner made application to probate the alleged will of David Gharky, deceased, who died August 16, 1877, at Santa Cruz, and left property of the amount of over \$1,000.

It was witnessed in trust to several certain persons, and one half the net annual income, was to be paid to his son David Gharky, semi-annually, during life, and after his death to his wife, and after that to the children, if any, and the other half of the annual income to the support of such poor people of Santa Cruz county as the trustees might name, and also the first named half to the same object, after the death of the heirs. Half

the principal or property might be invested in land and buildings near Santa Cruz to aid in carrying out his last purpose.

Or this will, John Werner was appointed executor.

If any child of the son David attained majority, then the one-half the estate to be theirs in fee absolute. In a codicil, dated May 19, 1873, the provisions in favor of the son David were transferred to his wife, Mary E., and he to have \$10 only. Mary E. died, leaving two children—a son and a daughter—and all her share was then transferred to them, and the son David to receive \$70 per month during life. Date of last codicil August 15, 1877.

The petition for probate of the will, dated August 23, 1877, shows property about \$8,000.

The srs. David Gharky, counters the will on the ground that the father was incompetent to make the will or codicils, by reason of habitual intemperance, and an insane delusion as to the son, and under undue influence of persons and prejudice against him. All of which the defendant denies.

Cause tried October 24, 1877, by a jury, and the will sustained, and Werner confirmed as executor. Motion made for a new trial, with a bill of exceptions of the case, which was denied, and an appeal taken by plaintiff on February 25, 1878, from the judgment and the order denying a new trial.

Judgment and order reversed, and cause remanded for a new trial. Remittitur withheld.

F. A. Adams and Charles B. Younger attorneys for contestants and appellant. W. D. Storey attorney for respondent.

Unwritten Decisions.

[Decided August 14, 1878.]

McLERNAN

vs.

BENTON.

} No. 4870.

Appeal from Fourth District Court, San Francisco.

MORRISON, Judge.

REMOVAL.—"VAIN NINE ORDINANCE."

STATEMENT OF THE CASE.

The plaintiff, W. G. McLernan, claimed to own in fee a certain parcel of land in San Francisco, on May 2, 1861, and upon the defendant, J. E. Benton, and several others, obtained adverse possession on May 24, 1861. This action was begun on June 4, 1862.

The case has quite a chronological history. At its first trial in the October term of 1862, the plaintiff was non-suited, and appealed, on which the judgment was reversed, and a new trial granted, in which defendant's judgment. Reopened in 31 Cal. Plaintiff again appealed from order denying new trial, tried in October term, 1869. Judgment and order affirmed. Rhodes dissenting.

A rehearing was granted, at which it was reversed, and a new trial ordered, at April term of 1872, as reported in 48 Cal., 467-70. The new trial was held at interval during a year, and findings filed in favor of plaintiff, on December 15, 1873.

On January 18th, 1874, defendant gave notice of intention to move for a new trial on January 24th, 1875. Motion for new trial was granted, and this is an appeal by plaintiff from that order. The defendants claim full and continuous possession and occupancy, and many and valuable improvements made, and hold title through Mary Ann and Peter Housell; while plaintiff derives title from Executors

Foley vs Harmon, December 14, 1888, and vested in him before it purports to be vested in Mary A. Russell, the grantor of defendants. The supplementary answer and cross complaint of defendants was demurred to by plaintiff, and demurrer sustained. Cause tried without jury, and findings for plaintiff as owner in fee, through the Mexican Grant to the Pueblo of San Francisco, confirmed by the United States.

Motion for new trial by defendant on many and various grounds and bill of exceptions including statement of the case, and sundry exhibits of title deeds.

New trial granted, and plaintiff appealed from the order.

Order now affirmed, Rhodes dissenting. Remittitur forthwith.

(The respondents claim that the main question in the case is, which party got the benefit of the Van Ness Ordinance, and assume that they did, *prima facie*, and hence are entitled to a new trial.)

B. S. Brooks attorney for appellant, *Wm. A. Bellamy* and *W. H. Patterson* attorneys for respondents. *E. W. P. Sloss* also acted for plaintiffs and *W. W. Stow* for defendants.

SUPREME COURT OF CALIFORNIA.

JULY TERM, 1878.

[No. 5697.—Filed Aug. 16, 1878.]

P. G. GELCHICK, Plaintiff and Respondent.

vs.

B. MORIARTY, et al. Defts. and Appellants.

Appeal from Sixteenth District Court, Inyo County.

REED, Judge.

MINING LOCATION.—DEFINITE BOUNDARIES.—

The findings not showing possession of any definite part of the ground in controversy, a decree cannot be based upon actual possession of any specific portion.

No title acquired under Act of Congress of May 10, 1872, where locations are not distinctly marked, so that the boundaries can be readily traced.

STATEMENT OF FACTS.

The plaintiff located a mining claim in Inyo County, on Nov. 29, 1874, by erecting a monument of rocks in its centre, with a written notice thereon of the name of locator, date, and number of feet claimed, and which notice of location was duly recorded in the office of the Recorder of Inyo County, on Dec. 2, 1874.

No local mining regulations had been adopted or were in force at these dates.

The miners subsequently established a district, and adopted certain mining regulations for its government, but the plaintiff did not re-locate under them.

On January 21st and 22, 1875, nearly two

months later, the defendants located and recorded the same claim under these regulations, but without abandonment by plaintiff. Before the expiration of a year after such location by plaintiff, this action was commenced for possession of the claim, in accordance with the terms of Sec. 2322 of the U. S. Revised Statutes.

The defendants deny the said location by plaintiff, by notice, etc.

Upon trial the Court found in favor of plaintiff. Defendant moved for a new trial, with a bill of exceptions.

Motion denied, and defendants appeal from the judgment and order.

L. Quint and *R. M. Clarke*, attorneys for plaintiff and respondent.

Reddy and *Conklin*, attorneys for defendants and appellants.

OPINION BY THE COURT.

The findings do not show that plaintiff has had the possession of any definite part of the mining ground in controversy, and plaintiff is therefore not entitled to a decree based on his actual possession of any specific portion.

Nor do the findings show that either party has acquired title under the Act of Congress of May 10, 1872; both parties having attempted to make location after the passage of that Act, and both having failed to distinctly mark their locations on the ground so that the boundaries can be readily traced.

Judgment and order reversed, and cause remanded for a new trial.

[No. 5654.—Filed August 16, 1878.]

J. L. HOLLAND and EDWIN TILLEY, Plaintiff and Respondent.

vs.

MOUNT AUBURN GOLD QUARTZ MINING Co., Defendants and Appellants.

Appeal from the Fourteenth District Court, Nevada County.

REARDON, Judge.

MINING CLAIM UNDER ACT OF CONGRESS OF MAY 10, 1872.—The location must be distinctly marked on the ground, so that its boundaries can be readily traced. (U. S. Rev. Stat., Sec. 2324.)

STATEMENT OF FACTS

This action was brought by plaintiffs for

the possession of a mining claim in Nevada County, entitled the Como mine, of which the metes and bounds are fully defined in the complaint, and of which they allege full possession and ownership on September 1, 1876. That on September 21st, while still in possession, the defendants unlawfully entered upon the claim, and ousted plaintiff, and still withholds the same, to the damage of \$1,000, for which they ask judgment, and restitution of the claim; and an injunction from working it by defendants pending the action. Defendant makes general denial, and alleges prior possession to the plaintiff or their grantors,—peaceable and undisturbed for more than five years next preceding the commencement of this suit. Upon trial the jury gave a verdict for plaintiff, upon which judgment was entered accordingly.

Defendants moved for a new trial, on the ground of irregularity in the proceedings, preventing a fair trial, which was overruled, and this appeal taken.

Johnson and Cross, attorneys for plaintiff and appellant.

W. D. Long and *George S. Hupp*, attorneys for defendants and respondents.

OPINION BY THE COURT.

The defendant was in possession of the mining ground prior to the date when the plaintiffs attempted to locate it under the provisions of the Act of Congress of May 10, 1872.

Before the commencement of this action the location of plaintiff was not *distinctly marked on the ground so that its boundaries could be readily traced*, as required by the Act. (*Rev. Statutes U. S.*, sec. 2324.)

Judgment and order reversed, and cause remanded for a new trial.

[No. 3961. Filed August 16, 1878.]

SHERMAN O. HOUGHTON, Pl'ff. and App't.
vs.

J. R. HARDENBURGH, Df't. and Respondent.

Appeal from the Twelfth District Court, San Francisco.

McKINSTRY, Judge.

ACTION IN REPLEVIN—to compel the delivery of a U. S. Patent for land, withheld by the U. S. Surveyor-General of California.

Authority of *Chipley vs. Farris* (45 Cal. 527) applied.

STATEMENT OF FACTS.

This action is brought by a writ of replevin to compel the defendant, the U. S. Surveyor-General for California, to deliver up to plaintiff a U. S. Patent for a tract of land known as "Las Animas," which patent had been fully executed by the Government, and sent to the defendant, for delivery to plaintiff.

After its receipt at the office of defendant, he received instructions from the Commissioner of the General Land Office to withhold the patent, and not deliver it to any person,—and this before plaintiff had demanded the same,—hence he refused to deliver it up.

Defendant demurred, which was sustained, and plaintiff declining to amend, judgment was rendered for defendant, from which plaintiff now appeals.

On motion of defendant's attorney it was ordered that plaintiff show cause why the writ of replevin should not be set aside for want of jurisdiction by the court, in that the patent in dispute is still under control of the U. S. Department of the Interior, and not properly subject to process of the court. That defendant does not *personally* detain the patent, but as an officer of the Government of the United States,—a corporation that cannot be sued except by its own consent. And that said patent is not *property* in the sense of the law providing for a writ of replevin, and, finally, that if plaintiff is entitled to remedy in the premises, it would properly be by writ of mandate. From the order of stay of proceedings upon said writ, and to show cause as adjudged, the appeal was taken.

Houghton and Reynolds, attorneys for plaintiff and appellant.

E. L. Gould and L. D. Latimer, attorneys for defendant and respondent.

OPINION BY THE COURT

On the authority of *Chipley vs. Farris* (45 Cal. 527), the judgment of the District Court is reversed.

Unwritten Decisions.

[No. 6041.—Decided July 24, 1878.]

JOHN REYNOLDS, Plaintiff and Respondent
vs.

WM. GRONEVILLE, Defendant and Appellant.

Appeal from the Twentieth District Court, Santa Clara County.

D. BELDEN, Judge.

ENJOINMENT.—Action brought for the recovery of land in the town of Sutter, Sacramento County.

STATEMENT OF THE CASE.

The plaintiff, Reynolds,—claiming ownership in fee to certain lands in the town of Sutter, Sacramento County, and deraining title from a U. S. Patent,—complains, that on April 2, 1877, the defendant, Groneville, took unlawful possession of the same, ejecting the plaintiff therefrom, who claims damages in the sum of \$1,000. The defendant answers by a general denial, and further sets up a leasehold of the premises from one Margaret Cunningham, who, he claims, was owner of the premises, (in conjunction with other parties) at, and a long time previous to the commencement of this action.

The cause was tried at the September term of the Twentieth District Court, in 1877,—jury being waived,—and after hearing the evidence, which was extensive and voluminous, the making and filing of written findings being waived, the Court adjudged that the plaintiff recover possession of the premises, and \$105 damages, with costs of suit. From this judgment appeal was taken.

Judgment and order now affirmed.

Houghton and Reynolds, attorneys for plaintiff and Respondent.

J. W. Armstrong and J. H. McKune, attorneys for defendant and appellant.

[No. 6085.—Decided July 30, 1878.]

SAMUEL JACKSON, Plaintiff and Respondent,
vs.

WILLARD P. STONE, Def't. and Appellant.

Appeal from the Ninth District Court, Siskiyou County.

ROSBOROUGH, Judge.

WATER RIGHT.—INJUNCTION.—

STATEMENT OF THE CASE.

Action in this case was brought for alleged interference of defendants with certain water ditches of plaintiff, and to restrain them from diverting the water of a certain creek from his ditches, and for general relief.

Two defendants were summoned in the case, but one only (Stone) answered the summons, who joined issue in all the allegations of the complaint. Upon trial, by jury, on October 11, 1876, the verdict was that plaintiff was entitled to 60 inches of water from "Carrick Creek," the stream in question.

Hence judgment was rendered that the defendant, Stone, be enjoined from diverting the waters of said creek to leave less than 60 inches, and that plaintiff pay the costs of suit. From this judgment and order defendant appeals on the judgment roll alone, with no motion for new trial or bill of exceptions.

The judgment was docketed October 24, 1876, and the notice of appeal was served and filed October 22, 1877, but the appeal bond for costs was filed October 26, 1877, more than a year after date and entry of judgment.

On these grounds the respondent, Jackson, urges that the appeal is too late, under Sec. 940 of the code.

Judgment and order now reversed, and cause remanded for a new trial.

S. W. Holliday, attorney for plaintiff and respondent.

E. Steele, attorney for defendant and appellant.

[No. 5510.—Decided Aug. 13, 1878.]

THOMAS AMBROSE, Plaintiff and Appellant,
vs.

E. ROPER and J. W. REAY, Def'ts. and Resps.

Appeal from Nineteenth District Court, San Francisco.

WHEELER, Judge.

GUARANTEED BY WRITTEN AGREEMENT.

STATEMENT OF THE CASE.

Jacob C. Beidman died previous to 1862, leaving a will, and certain real estate in San Francisco; and John W. Brumagin, the administrator, sold the real estate on July 24, 1860, by order of the Probate Court; which the plaintiff, Ambrose, bid off for \$3,100. Upon the deed being made and tendered to him, he refused to take it and pay the amount, because of certain representations made to him by the defendant, Reay, that *he owned* the property, etc.

The land was *resold*, and bid off by the defendants, for \$323. The administrator had threatened that if the land did not bring as much at the second sale as at first, he would compel plaintiff to pay the loss, and he, plaintiff, fearing this, and to protect himself, was about to bid again for the land, when the defendants offered a guarantee, and made an agreement in writing, (signed by the three persons) to hold him harmless.

So plaintiff made no further bid, and took no further steps to protect himself.

In June, 1871, the administrator, in an action in the Fourth District Court, (which the defendants defended for plaintiff) recovered judgment against plaintiff for \$2,457.62. Appeal was taken on this, and the judgment affirmed, so plaintiff was compelled to pay, and did pay, in full, \$3,000.

For this amount, plaintiff in the present action asks judgment, with interest. Action brought July 29, 1875. At trial, plaintiff put in evidence, a copy of the written agreement, purporting to give the "material part." Defendants demurred, on the ground of ambiguity, as the whole of the agreement was not given. Demurrer sustained, with 10 days for plaintiff to amend, which was not done, and judgment given for defendant.

From this, appeal was taken on January 4, 1877. And now, there being "no appearance of appellant, the judgment is affirmed."

M. A. Wheaton, attorney for plaintiff and appellant.

J. M. Seawell, attorney for defendant and respondent.

[No. 3025.—Decided August 13, 1878.]

B. S. BROOKS, Plaintiff and Respondent.

vs.

R. S. CARPENTIER, et al., Def'ts. and App'ts.

Appeal from Fifteenth District Court, San Francisco.

DWINELLE, Judge.

Action to Recover an Assigned Contingent Share in a Sobrante Rancho, for professional services rendered.

STATEMENT OF THE CASE.

A Sobrante Rancho (after the Ranchos San Antonio, San Pablo, Pinole, Murango and Valencia should be finally located) was granted to Juan Jose and Victor Castro. They sold same to John B. Frisbee and Ramon DeZaldo; and they, holding in fee, made a contract with Horace Hawes,—now dead,—to act for them before the Board of U. S. Land Commissioners, in the survey and confirmation of their claim, for which he was to receive three per cent. of the land when finally determined. He did so act, and got the title. Hawes sold a half of his claim to plaintiff. The land had not yet been surveyed, because the San Antonio had not, which was first necessary. But the rancho in question probably amounted to about 35,000 or 40,000 acres, though not yet segregated from the surrounding ranches.

Hawes sold the other half of his claim to Frisbee, one of the fee owners, but it is claimed that Frisbee (also DeZaldo) has now

no interest in the land, having sold it to various parties, i. e., R. S. and H. W. Carpentier. Edson Adams and John H. Saunders, also defendants here.

Defendants now threaten to sell, hence plaintiff asks for decree of relief, and judgment (for 3 two-hundredths share of the said rancho). Defendants, Frisbee and DeZaldo, demur, on the ground of the action being barred by Sec. 19, of an Act defining the time of the commencement of civil actions.

The other defendants also demur, on various grounds, and all are overruled, with 10 days to answer.

No answer being made, judgment was given for plaintiff, with costs. But, it appearing that after the sale to R. S. and H. W. Carpentier, enough land was still left to satisfy plaintiffs' claim, the judgment was not given as against them.

Defendant, Edson Adams, moved to vacate the judgment, charging collusion between the plaintiff and the two Carpentiers, in releasing them from the judgment. Motion denied. A motion was made by plaintiff to adjudge Adams guilty of contempt in not obeying the judgment, and it was so ordered, with confinement in the County jail.

Appeal taken by Adams from the order denying motion to vacate the judgment.

There being now "no appearance for appellant, the judgment and order is affirmed."

B. S. Brooks, in propria persona, attorney for plaintiff and respondent.

H. W. Carpentier, attorney for R. S. and H. W. Carpentier, defendants.

W. H. Patterson, attorney for Frisbee and DeZaldo, Defendants.

H. P. Irving and Edward F. Head, attorneys for appellant, Edson Adams.

THE ELLIS TIDE LAND GRANT.

vs.

THE "VAN NESS ORDINANCE."

The decision rendered on July 29th, last, by Justice Field, of the Supreme Court, sitting in civil cases in the U. S. Circuit Court, is important, as affecting the title to the lands known as the "Ellis Tide Lands," and also the boundaries of the Pueblo grant to the city of San Francisco. The decision was given orally, the Judge stating his views at length, and observing that he would, at a future day, file an opinion embodying their substance. A day was fixed for counsel to prepare the findings, but the case was soon afterward settled, and the suit dismissed by stipulation of the parties.

The parties were C. C. Tripp, vs. F. S. Spring, and the issue the possession of a part of the Block Number 60, bounded by Mission, Howard, 17th and 18th streets. The plaintiff is a citizen of Illinois, and derives his title from the conveyance to George W. Ellis, by the State Board of Tide and Land Commissioners, in November, 1875. The defendant is a citizen of California, and claims under conveyance from parties who acquired title under the ordinance known as the "Van Ness Ordinance," and the subsequent confirmatory legislation thereto. It is felt to be a test case upon which numerous other cases of like bearing may be determined. It was tried by the court, without jury, by stipulation of the parties. The plea of the plaintiff was that they were either tide lands of the Bay of San Francisco, and hence their title vested in the State as a sovereign; or that they were, upon her admission, salt marsh lands, which at once passed to the State under the "Swamp Land" Act of Congress of September 28, 1850, and in either case were conveyed by the State to Ellis, and their deed was made *prima facie* evidence of title.

But, Pueblo rights attached to the city upon the cession of the country from Mexico, which were entitled to a precedence, over all others subsequently acquired, and were confirmed by later legislation. The conclusion is that these premises are a part of the tract confirmed to the city by the decree of the U. S. Circuit Court, entered May 18, 1865.

And that became *final* by the Act of Congress of March 8, 1866, and which was followed by a dismissal of the appeal to the Supreme Court.

The defendant, having shown that his grantors were in peaceable, actual possession of the land at the time the "Van Ness Ordinance" took effect, and on the passage of the confirmatory Act of the State Legislature, and had made valuable improvements upon it; had thus acquired the city's title, and so brought himself in connection with a superior title to that of the plaintiff.

Hence judgment must be entered in his favor.

And it was added that no patent of the United States which may be hereafter issued to the city from the Land Department, can either add to or take from the title already vested in the city, or those claiming under it, as the confirmatory Act of Congress will control any patent the Department may issue.

U. S. LAND DECISIONS.

WASHINGTON, August 15.—In the case of Hans Hagland vs. the Northern Pacific Railroad Company, the Secretary of the Interior has decided that the grant of the Northern Pacific Railroad Company attaches to land acquired under the Sisseton and Wahpeton treaty outside of the reservation, they having been acquired prior to the definite location of the road, and that the settlement of claims upon the granted section were excluded by the sixth section of the Act of July 2, 1864, making the grant to the Company. The decision determines the right to a large tract of land in Dakota. The Hagland settlement on these lands was in violation of law and treaty obligations, the Indian title not having been extinguished at the time of settlement thereon, and the withdrawal of the Company having preceded the extinguishment of the Indian title.

QUESTION OF OFFSET.

A Judicial Opinion of Special Interest to Stock Operators.

The following decision rendered Monday, Aug. 19th, by Judge T. W. Freelon, of the Municipal Court of Appeals, will be read with interest by business men and stock operators in particular:

In the case of A. F. Benjamin vs. Charles Aitken, argument was concluded on Saturday night. The argument had occupied three entire sessions of the Court, on account of the importance of the questions involved to the brokers generally, so far as the decisions of this Court go, and also because many of the questions involved in that case were involved in twelve or fourteen suits already before the Court. The facts of the case, in short, so far as necessary for the decision of this case, are, that Benrimo and Aitken were members of the Nevada Stock Exchange; that, as such, they had dealings with each other as principals; that, as one of the results of these dealings, Benrimo be-

came indebted to the defendant Aitken in a large sum of money, for which he gave his notes, payable at 60 and 90 days. After this, and while the notes were still due and not paid, Aitken bought of Benrimo 300 shares of Imperial, buyer ten. At the expiration of the ten days Benrimo offered the shares to Aitken, and demanded payment; Aitken told him that he desired to set off Benrimo's note against the price of the stock. Benrimo then, for the first time, informed him that he was not dealing for himself, that the shares belonged to Mr. Smiley, showed him the shares with Smiley's tag on, and refused to allow the set-off. The shares were sold by Benrimo, in the Board, according to what was claimed was the custom of the Board, at a loss of \$117.50. Benrimo assigned the claim to Benjamin, who brought suit for that amount, which is the suit now at bar. It was claimed on the part of the plaintiff that, Benrimo being a broker, defendant was bound to take notice, from the fact of his employment, that he was not doing business for himself, but was doing business as an agent. There is some conflict of authority upon that point. It is not necessary, however, to decide it, because the facts of this case are that before that time Benrimo and Aitken had been doing business together of this same kind, as principals. And the proof shows that, in point of fact, defendant supposed that he was dealing with Benrimo as principal in this transaction. But the fact that they had been dealing together before as principals makes it unnecessary to decide whether or not a stranger dealing with a broker is bound to take notice that the broker is not acting for himself.

It seems that one Cook was indebted to Benrimo. Benrimo held his notes. Cook was a friend of the defendant Aitken; and the defendant, at the request of Mr. Cook, handed him these notes for the purpose of setting them off, in Cook's hands, against the indebtedness of Cook to Benrimo. They were given to Cook for that special

purpose. Cook tried to set them off, but Benrimo declined to allow a set-off, upon the ground that Cook's notes were not then owned by him. It was claimed that by this transfer of the notes Aitken lost the ownership of them, so that he could not set them off against the indebtedness of Benrimo. Aitken and Cook both swore that the ownership had never changed, and the facts show that the notes were transferred for the single purpose, and without consideration, of allowing Cook to use them if he could; if not, to return them to the defendant. After Cook had failed to use them, he notified the defendant that he had so failed, and he was at liberty at any moment to have taken the notes back. In point of fact, under this transaction, both as to the question of fact and as to the question of law, the ownership never had changed. Aitken could, at any moment, from the time the notes were first put into Cook's hands, without consideration, until the time when these suits were commenced, have reclaimed the notes. The notes were, as proof shows, in the possession of Aitken at the time he offered them as an offset, and were his property beyond doubt at that time. Such being the facts, the Court finds that the notes were a legal offset, and that Benjamin, the assignee, stands in no better position than Benrimo, the assignor, and that judgment should be for defendant.—*Bulletin.*

JULY TERM, 1878.

APPEALS DISMISSED.

July 8th.—No. 6152.—*Kingsbury vs. Kelley*, On motion of Campbell for respondent.

No. 5881. *Parsons vs. Armstrong*,—On motion of Fox, for respondent,—Without costs.

No. 6112.—*Jannsens vs. Hill, et al.*—On motion of Bishop for respondent,—Counsel for appellant not objecting.

No. 6113.—*Gonzales vs. Hill, et al.*—Same as above.

No. 5819.—S. F. Savings Union vs. Johnson,— On motion of Fox for appellant.

July 9th.—No. 10,348.—People vs. Gibbs,— Stricken from Calendar, on motion of Attorney General.

15th.—No. 6171.—Estate of James Holbert, deceased,—On motion of Elliot for respondent.

No. 5884.—City of Stockton vs. Reed, et al,—By consent,—cause settled.

17th.—No. 6174.—Cal. M'fg. Co. vs. Graham,— On motion of Thompson for respondent.

No. 6037.—Estate of Jas. Holbert, deceased,—Argued by Budd for respondent and Elliott for appellant.

24th.—No. 4970.—Lyons vs. Beale, et al,—For want of prosecution.

29th.—No. 6192.—Gordon vs. Splivalo,— On motion of Sawyer for respondent.

Aug. 5th.—No. 6202.—Duane vs. City and Co. S. F.,—On motion of W. C. Burnett for respondent.

No. 6153.—Treadwell vs. Stiger,—On motion of J. M. Seawell for resp't.

No. 5576.—Stoddart vs. Burge,—As to the "Order denying defendant's motion to vacate and set aside an order dismissing defendant's cross complaint, directing judgment, etc." As to judgment,—denied.

7th.—No. 5857.—Bianchi, et al, vs. Hood,—By stipulations on file.

No. 5927.—Peterson et al, vs. Evans, et al,—Without costs, by stipulations on file.

12th.—No. 5830.—Prescott vs. Salthouse, (See opinion in RECORD No. 19 and 20.)

13th.—No. 4831.—Hart, et al, vs. Finnegan,—For want of prosecution.

19th.—No. 6212.—Lothian & Co. vs. Collier, et al.,—On motion of Wilson for respondent.

21st.—No. 6087.—Helm vs. Underhill,— Without costs, on motion of Gunnison.

22d.—No. 6214.—Crant vs. Burr, et al.,— On motion of Cowles and Drown for resp.

CAUSES CONTINUED.

July 10th.—No. 5411.—Felton vs. Robinson,—To October term—at Los Angeles.

11th.—No. 5964.—Hidden vs. Jordan, et al,—For the term—by stipulation.

15th.—No. 6162.—Cadd vs. Clark,—To October term at Los Angeles—by stipulation on file.

Aug. 5th.—No. 6067.—People vs. Gardner,— To November term—on motion of Harrison.

21st.—No. 5683-5694.—Carry vs. Alvarado,—Till Sept. 24th—by stipulation on file.

PETITIONS FOR REHEARING.

July 31st.—No. 5422.—Monterey and Salinas Valley R. R. Co. vs. Hildreth. (Reported in RECORD No. 17.)—On motion of William Matthews.—Stay of proceedings granted.

Aug. 6th.—No. 5191.—Keller vs. Lewis.— (Reported in RECORD No. 17.)—On motion of Glassell, Chapman and Smiths.—Stay of proceedings granted.

Aug. 21st.—No. 6041.—Reynolds vs. Groneville,—(Reported in RECORD No. 21.)—On motion of Armstrong—stay of proceedings granted.

ADMITTED TO PRACTICE.

July 8th.—H. T. Hazard,—On motion of J. J. Williams, and evidence of admission, to all the courts of Michigan.

S. C. Scheeline,—On motion of S. Rosenbaum, and license from Supreme Court of New York.

11th.—Wm. D. Storey,—On motion of John C. Hall, and license from the Supreme Court of New York.

15th. Lewis H. Redfield,—On motion of Hon. John C. Burch, and license from the Supreme Court of New York.

Aug. 9th.—R. B. Treat,—On motion of E. G. Stetson, and license from Supreme Court of New York.

12th.—Jere. S. Black,—On motion of S. O. Houghton, and evidence of admission to the Supreme Court of the United States.

15th. Charles M. Keinston,—On motion of T. K. Wilson, and license from Supreme Court of New York.

CALIFORNIA LEGAL RECORD.

Vol. I.

SATURDAY, AUGUST 31, 1878.

No. 22.

Legal Notes.

"GHARKY vs. WERNER"—CORRECTED.—Since reporting this decision in our last issue, we are indebted to one of the attorneys in the case.—C. B. Younger, Esq., of Santa Cruz,—for an additional Statement of Facts, which we add in this number—republishing the case entire.

"SUPREME COURT RECORD."

Under this new head we shall henceforth note each week (commencing last week) every *Appeal Dismissed*; or *continued for the term*; *Rehearing*;—and "Admitted to Practice"; which, with our report of every *Decision and Opinion rendered*, will give the *final disposition of every case* on the calendar for the term.

REMOVAL OF THE 23d DIST. COURT.

A LEGAL POINT INVOLVED.

Judge Thornton, of the Twenty-third District Court, called the attention of attorneys, yesterday morning, to the instruction of the Supervisors to remove the Court to rooms in the New City Hall, and questioned the power of the Municipal Fathers to do anything of the kind. He referred to the Act of the Legislature creating the Twenty-third District Court, which he thought prevented the Board of Supervisors assigning a room in which business shall be transacted just where they please. He thought it would be a violation of the Constitution creating District Courts. If, said the Judge, it should turn out to be the case that the removal of the Court out of its District by the Board of Supervisors was in violation of the Constitution, it would cause great inconvenience to the members of the Bar, and inflict much injury upon litigants, the parties most deeply interested. Under the decision of the Supreme Court in *ex parte Wall and Houghton*

vs. Austin, the fact of the Court being held out of its District would render its judgment of no effect; nor would the Court have the power to compel the attendance of witnesses and jurors. He suggested that members of the Bar assist him in having the matter brought before the Supreme Court, and passed upon, if possible, before the 30th of September, which is the date fixed for the removal of the Court, either by mandamus or in some other way. In conclusion, the Judge stated that if the law removing his Court-room to the New City Hall is constitutional, he would obey it without hesitation, although the room which has been assigned for his use is a most disagreeable one, and into which the sun never penetrates.

Morning Call.

A CURIOUS DECISION.

SENTENCING A MAN BY SECTIONS.

There was a bit of grim humor in a certain judicial decision of Judge Kent. I think the court was in session at Bangor. The case was the State versus Thomas Cowdry. Said Thomas Cowdry was accused of having committed burglary, and a bill had been found by the grand jury. Upon trial it appeared that Cowdry had been employed with a gang of lumbermen up the Penobscot river, where he had cut his way through a tent belonging to another party, and stolen certain articles of clothing, together with a sum of money.

It was brought out by evidence that the tent in question was of firm rubber cloth, and much more comfortable than the common log huts. In the rear part of this tent had been a chest, the location of which the prisoner had carefully noted, and on a certain night, while he thought the inmates slept, he cut his way through the fabric and committed the theft. A young man of the

crew had been awake, however, and had witnessed the proceedings, but had held his peace at the time for fear that Cowdry, who had the name of being a bad man, would kill him. This witness, in court, described the whole thing, and no amount of badgering on the part of the counsel for the defence could shake him. In answer to the question of how much of the defendant's body was at any time within the tent, he said that he could swear that he saw Cowdry's right arm and right shoulder, and the whole of his head inside the tent. So much was proved beyond a doubt.

But the counsel for Cowdry, a lawyer from down the river, named Lasoom, spread himself.

"My client is accused of having feloniously broken his way into and entered the dwelling of a certain individual. Never mind what further is charged against him. Did he enter—bodily enter—this dwelling? It is ridiculous to say so. A witness says he put in an arm, and, perhaps, his head. What do we mean by *entering* a place? Must not the feet stand within it?"

And so the blustering pleader went on. He had never, in the whole course of his life, heard anything so utterly ridiculous given in seeming seriousness, as this charge. He put it directly to the court if a man could be said to have entered a dwelling when, in reality, he only *looked in*—when only his head was in, and an arm to steady him, perhaps. *Could* he have entered a dwelling when by far the larger part of his body, with all the organs of locomotion, were all the while out of doors? And if not, then the indictment fell to the ground; for it charged that his client actually entered the said dwelling. For the honor of the Pine Tree State—for the credit of justice everywhere—he hoped the court would rule against any such monstrous perversion of fact.

In his charge to the jury, Judge Kent, with a grim smile, alluded to the plea of the prisoner's counsel, and instructed them that,

if they were in doubt as to the guilt of the whole man, they might bring him in guilty as far as they judged the evidence would warrant.

And the jury, after a brief period of consultation, brought in a verdict against Thomas Cowdry the prisoner at the bar, of guilty to the full letter of the indictment as to his right arm, his right shoulder, and his head.

And the Judge sentenced the arm, the shoulder and the head of said Thomas Cowdry, to imprisonment at hard labor in the State's Prison, for the term of two years. The prisoner might do with the remainder of his body what he pleased.

The story was told to me by an old resident of Bangor for a fact. I knew Judge well, and can vouch for his love of the humorous, though I do not, of course, dare assert that my informant has not stretched the scene a very little.—*S. C., Junior, is N. Y. Ledger.*

Liability of the Separate Estate of A Deceased Person on A Joint Mortgage.

The Hibernia Savings and Loan Society sought to foreclose a mortgage executed by Mary Jane Madden, since deceased, and her husband, to secure notes given by the latter, by proceedings against the executors of her separate estate, in the Probate Court. The application to sell the mortgaged property was resisted on the ground that this was not a debt outstanding against the decedent within the meaning of Section 1536 of the Code of Civil Procedure. In his decision upon the question Judge Myrick said:

"It is true that this may not be, in a technical sense, a debt of the decedent; but it is, by the contract, a debt for the payment of which a specific portion of her real estate is liable. Is it not, within the meaning of the Code, a *debt outstanding* against her? In the meaning of the Code, the words "against the decedent" are the same as if the words were "against the property of the decedent."

The Supreme Court, in *Harp vs. Calihan* (46 Cal., 231) says, in referring to the presentation of a similar case, that 'the policy which dictated the provision requiring claims against the estate to be presented within a fixed period, was intended to expedite the settlement of the estate, and to enable the Administrator and the Probate Court to ascertain speedily, and with certainty, what debts were to be provided for, what sales of property would be necessary, and when the estate would be ready for distribution.'

"If, after such a claim has been made, it cannot be paid by the executor, how is the settlement of the estate expedited? The executor would simply have to fold his hands and wait the foreclosure by the creditors, which might be deferred to within a day of four years, at a rate of interest ruinous to the interest of the estate in the mortgaged property; whereas by selling and forcing the creditor to take his money something might be saved. If it is not a 'debt outstanding against the decedent,' the executor could not pay it, even if he had plenty of other resources. Let a decree be made overruling the objections, and that a sale de had."

AUCTIONEER'S COMMISSION.—A man named Willard was arrested on a charge of assault with a deadly weapon upon Joseph Spear, the auctioneer. He claimed that Mr. Spear charged him too much for selling certain goods, and during the dispute which arose when he wished to settle the bill, drew a revolver. The transaction about which the trouble arose was the disposal by auction of one bookcase and bedroom set, which brought \$179.50, and for selling which Mr. Spear charged \$22.25. This, Willard has made the basis of a complaint against Mr. Spear, charging him with a misdemeanor in charging more than one per cent. on the transaction. Section 3309 of the Political Code says: "No auctioneer must demand or receive a higher compensation for his services than a commission of one per cent. on the

amount of sales, public or private, made by him, unless by virtue of a previous agreement in writing between him and the owner or consignee. Every auctioneer who violates this section, in addition to the criminal penalty, forfeits to the party aggrieved \$250, and must refund the excess of charge." By the Penal Code a violation of the above is constituted a misdemeanor. It is said that auctioneers have been accustomed to charge eight, nine and ten per cent. on sales, being ignorant of the law, and the disposal of this case will consequently be of great interest to them.

Executors Responsible to the Probate Court

In the matter of the estate of R. D. Taylor, the Supreme Court lately decided upon a writ of *certiorari*, relevant to R. S. Smith, one of the executors, that the Probate Court has a right to order an executor or administrator into custody for contempt in not obeying the orders of the Court. Upon the filing of the remittitur, R. S. Smith and William Smith, the executors, were both placed in custody, and they remained in custody of the Sheriff for several days. The matter has now been satisfactorily arranged by payment of the money ordered to be paid, and both have been released. The Probate Court is thus affirmed to be the supreme executor of estates, and it is the first time that it has.

THE MONETARY CONFERENCE.—Paris, August 20th.—Following are the propositions submitted to the Monetary Conference by the United States delegates, now under discussion:—First—It is the opinion of this Assembly that it is not desirable that silver be excluded from free coinage in Europe and the United States. On the contrary, this Assembly believes it desirable that the unrestricted coinage of silver and its use as money of unlimited legal tender should be retained where they expand, as far as practicable, and restored where they have ceased to exist. Second—The use of both gold and silver as unlimited legal tender money may be safely adopted—first, by equalizing them at a relation fixed by international agreement, and, second, by granting to each metal, at the relation fixed, the equal terms of coinage, making no discrimination between them.

TULARE VALLEY SWAMP LAND.

End of a Tedious Legal Controversy — The Lands Described in the Montgomery Patent Awarded by the Twelfth District Court to those who Have Been in Possession for the Past Ten Years.

A case has been on trial for over two weeks in the Twelfth District Court which presents one phase of what has caused bitter litigation in the Courts of Fresno county and this city, and many Legislative contests, and which is of great interest to many people in the upper part of the San Joaquin Valley. The title of the case is, the People upon the relation of John L. Love, Attorney General, vs. John Center et al., and is to set aside a patent issued in 1867 for 39,130 acres of land in Fresno and Kern counties:

The facts of the case are these: It seems that in 1867 the Legislature made a grant to W. F. Montgomery and four others of one-half of a tract of swamp lands in the San Joaquin Valley, upon condition that in five years they should reclaim the whole tract and dig navigable canals extending from Kern lake to the waters of the San Joaquin river. Montgomery and his associates made deeds to Pothemus, Jones and others, who undertook to do the work, but after a while abandoned it.

In 1868 the Legislature passed another Act, renewing the grant upon the same conditions to Montgomery and others. Montgomery then made second deeds to other parties who undertook to comply with the conditions of the grant. In 1869 the Legislature released the grantees from the obligation to dig the canals, but still required that the whole tract should be reclaimed. Parties holding under the second deeds from Montgomery and his associates reclaimed a little of the land, and managed in some way to get a patent from the State for 39,130 acres in 1867.

These parties then made deeds to numerous persons of all the land covered by the patent, who supposed they were getting a good title. Part of the town of Bakersfield is built on the land, and the settlers and claimants have expended over \$1,000,000 in permanent improvements upon different portions of the land covered by the patent.

In 1876, parties who held under the first deeds executed by Montgomery began to stir up a claim to the land, and about the same time Haggin and Carr cast longing eyes upon fertile fields included in the tract, and a day or two before Attorney General Love went out of office this suit was brought to set aside the patent. Haggin and Carr having meanwhile caused applications to be filed, to purchase this land from the State at one dollar per acre.

Last winter the Legislature passed an act giving the settlers who claimed under Montgomery, the right, in case the Court should hold the patent void, to come in and prove that they brought in good faith, also to prove their possession, their improvements and payment of taxes, and get a new patent. The Court has decided the patent to be void, but has also decided that the settlers who have purchased in good faith are entitled to new patents.

Messrs. Stewart and Greenhouse appear for plaintiffs, who are supposed to be the People. Warren Oney, Houghton & Stetson, L. S. Cutler and others appear for the settlers. J. T. Boyd

and F. G. Galpin appear for those claiming under the first deeds executed by Montgomery and his associates.

The argument in the case was closed yesterday, and Judge Dalingfield rendered judgment from the bench, giving the lands described in the Montgomery patent to the actual occupants, who have been in possession for ten years, and have improved the same.

In speaking of the effect of the Act of 1878, under which the trial was had, the Court decided that all the rights which any one had as against the State were such as the State specially granted to those who hold regular conveyances from the grantees under the so-called Montgomery title. That the statute of limitations could only be invoked where possession would have barred an act on against the State.

That the defendants had fully paid the value of the land in improve-ments under the act of 1878, and that all except Ellen Green had regular conveyances from the grantees of Montgomery and others, the original patentees.

The law question as to the validity of the Montgomery patent having been decided in favor of the State some days ago, this case possessed very little interest, the only question left being whether the claimants had spent one dollar an acre in the improvement of the land.

The case occupied a good deal of time, owing to the number of claimants, proving up their rights, but really involved very few new or interesting legal propositions. — *Daily Bulletin, August 28th.*

How the Tax on National Banks must be Levied.

WASHINGTON, August 23d.—The following explains itself:

To Hon. B. Hawley, Acting Secretary of the Treasury—SIR: In compliance with request, I have compared the second item of section 348, Revised Statutes, imposing a tax upon capital employed in the business of banking beyond the average amount invested in United States bonds, with Revised Statutes, section 5314, which requires every association named in that chapter entitled national banks to pay duty semi-annually on the average amount of its capital stock beyond the amount invested in United States bonds, with a view to determine whether the amount so invested is to be ascertained by taking the price paid on the market value of these bonds, as is done by the Commissioner of Internal Revenue under the first cited section, or by looking only at their face value—the method adopted by the Treasurer of the United States under the last named section. The certainty and uniformity particularly desirable in fixing a basis for taxation, as well as common usage in speaking of the amount invested in any enterprise according to par value of the shares owned, disregarding brokerage paid and accrued interest or earnings, indicate that it is only the principal sum, payable at the maturity of the bonds, which are proper ones to enter into the computation of the amounts invested in them under the section of the Revised Statutes to which you have referred me.

CHAS. DEWEES, Attorney-General.

SUPREME COURT DECISIONS.

JULY TERM, 1878.

(Filed August 26, 1878.)

YBARRA
vs.
LORENZANA. } No. 6025.

Appeal from the Seventeenth District Court, Los Angeles County.

DENSON, acting Judge.

DEED FOR LAND, INTENDED AS A MORTGAGE—WHEN VALID. In a deed made for the purpose of defrauding, hindering or delaying creditors, the grantor cannot be relieved against its operation. While subject to the attack of creditors, as to him it is valid.

STATEMENT OF FACTS.

This action is brought for reconveyance of mortgaged premises.

George C. Gibbs, Court Commissioner and referee in the case, finds that on July 6, 1876, Ramon Ybarra borrowed of defendant, J. C. Lorenzana, \$500, and gave note, secured by mortgage, for payment, in one year from date, with interest at one and one-half per cent per month.

The premises mortgaged were the Ybarra vineyard lot No. 4, City of Los Angeles. On July 19, 1876, plaintiff executed to defendant, a deed of the premises, and the mortgage was cancelled, but no defeasance in writing was made, and no money passed between the parties.

The money loaned by the defendant was that of his wife Casaria V. de Lorenzana, and he acted as her agent in the loan matter.

On August 2, 1876, plaintiff executed to defendant another deed, for the purpose of correcting the description of the premises; and on August 22, 1877, defendant, J. C. Lorenzana, conveyed the premises to said C. V. de Lorenzana, who took with a full knowledge of the loan, and the note and mortgage as security therefor. Further, that the first deed was in fact a mortgage, given for the continuing of the loan, and since its execution, premises and received rents therefor.

Amount received to January, 1878, is \$375, and had paid during the time, street assessments and taxes, \$73.18 for the years 1876-7; and a judgment against plaintiff of \$191.19, it being a lien on the premises, at the time of the giving of the deed, by plaintiff. On August 10, 1877, plaintiff offered to pay the original note and interest, demanding a reconveyance.

Upon these findings of the referee, the court held that the plaintiff is entitled to a reconveyance upon payment of the amount due—after adjusting what had been paid out and received by defendants—balance \$512.87 with interest thereon—if paid within a specified time. If not so paid, plaintiff is barred of all equity of redemption, and the title of defendant, C. V. de Lorenzana becomes absolute.

From this judgment, appeal was taken by the defendants.

Hartman & Haley, and *H. T. Hazard* attorneys for plaintiff and respondent. *Thom & Ross*, attorneys for defendants and appellants.

BY THE COURT.

The findings are attacked on the ground that it appears by the evidence that the plaintiff executed the deeds of July 19th and August 2d respectively, for the purpose of defrauding his creditors.

The plaintiff testifying in his own behalf (fol. 81) stated as follows: "The paper (the conveyance

of July 19th) was made because parties wanted me to pay more than was justly due them, and, therefore, I went and made this conveyance of this piece of land to Mr. Lorenzana, to save it from being taken from me to satisfy an unjust debt." Again (fol. 83) he testified as follows: "I executed this deed (the deed of August 2d) because I was afraid they would attack the property. I executed it for the purpose of saving him for the payment of the money I owed him, (Lorenzana,) and the land."

The deed of August 2d was executed for the purpose of correcting a mistake in the description in the boundaries of the land conveyed by the deed of July 19th, and the complaint was filed for the purpose of obtaining a decree, declaring the conveyance of August 2d to have been a mortgage merely, and not an absolute deed, as it purports, on its face, to be.

The answer denied that the deed in question was intended as a mortgage.

The judgment given below was that this deed was a mortgage merely, and that the plaintiff be allowed to redeem it, etc.

As seen already, the evidence given by the plaintiff himself, when testifying as a witness in the cause, was to the effect that the purpose of the conveyance was not only to secure the defendant Lorenzana in the payment of the debt due to him, but also, to invest him with the legal title in order that the creditors of the grantor, plaintiff here, might be hindered in the collection of their debts against the plaintiff. Such a conveyance, while subject, of course, to the attack of the creditors, is valid as against the grantor. It is a settled principle of law that the grantor, in a deed made for the purpose of defrauding, hindering or delaying his creditors, cannot be relieved against its operation. As to him it is valid.

The rule in this respect is one common to courts of law and equity, and is expressed in the maxim, "*In pari delicto melior est conditio defendentis.*" (1 Story Eq. Jur., § 61.)

Judgment and order denying a new trial reversed, and cause remanded.

(Filed August 26, 1878.)

IN THE MATTER OF }
THE ESTATE OF CROSBY. } No. 8980.

Appeal from Probate Court, Santa Clara county.

D. S. PAYNE, Probate Judge.

PROBATE PROCEEDINGS—CREDITORS' CLAIMS—SALE OF REAL ESTATE. On a petition for the sale of real estate, the heirs may contest the validity of allowed claims. The allowance by the Probate Judge of a judgment as a claim against the estate, is not conclusive on the heirs. A stranger to a judgment against a decedent, even though he be the equitable owner thereof, is not the proper party to present the same for allowance as a claim against the decedent's estate.

STATEMENT OF FACTS.

Sam'l. J. Crosby died intestate, on March 29th, 1839, owning 900 acres of land in Santa Clara county, and an undivided third of the Cuyamaca Rancho in San Diego county, (containing about eight leagues of land,) but no personal property found. On June 29th following, the court granted letters of administration to Edward P. Reed, and he filed on December 29th, an inventory of the land in Santa Clara county, appraised at \$2,700; but no mention was made of the interest in the Rancho Cuyamaca, although papers were in his hands that would give him full knowledge of it.

Claims against the estate were duly presented, among them one by W. T. Wallace, for \$740. On June 28th, Reed filed a report and account; and on July 31st filed his resignation as his final account, which was accepted and allowed on August 11th. On August 28th, 1880, all the lands in Santa Clara county were sold on an order by the 3d District Court to satisfy a judgment of foreclosure of one Elisha Overfelt.

On March 31st, 1881, E. P. Reed obtained a writ of execution from the Third District Court, upon a judgment in favor of Elliott Reed, for the sale of the San Diego property, which Reed bid off, in full satisfaction of the judgment, and obtained a sheriff's deed.

Freeman B. Smith, as subsequently appointed administrator of the estate, filed, on May 2d, 1876, an inventory and appraisal of the Ouyamaca Rancho property, valued at \$30,000.

Doubt having arisen as to the validity of the execution issued to Reed, an agreed upon case was submitted to the Twentieth District Court, which decided it void, and the judgment not satisfied.

The Probate Court found it necessary to order a sale of the said San Diego property to satisfy the claims allowed of \$25,000. From the order of sale of November 24th, 1877.—Evelyn C. Crosby, widow, and Samuella Crosby, only child of the deceased; appeal to the Supreme Court.

S. F. Leib, and James H. Birch, Jr., attorneys for heirs and appellants. Houghton and Reynolds, attorneys for respondents.

BY THE COURT.

If the promissory note on which the judgment in favor of Elliott Reed was founded, had not gone into judgment in the lifetime of Crosby, and had remained in the possession of Elliott Reed, without assignment, it could only have been presented for allowance in his name, even though E. P. Reed may have been the equitable owner of it. (*Marsh vs. Dooley*, April Term, 1877.)

The fact that it had gone into judgment during Crosby's lifetime, cannot vary the principle. It was a judgment in favor of Elliott Reed, and when presented for allowance by E. P. Reed, in his own name and for his own use, it had not been, and the findings show has never been assigned to him.

If it be assumed, that in allowing the judgment as a claim against the estate, the Probate Judge must be held to have decided on the evidence before him that the judgment had, in fact, been assigned to E. P. Reed, nevertheless his decision is not conclusive on the heirs. It is well settled in this court, that on a petition for the sale of real estate, the heirs may contest the validity of allowed claims. (*Lockett vs. Sawyer*, 7 Cal., 215. *Estes vs. Schroeder*, 48 Cal., 304.)

If it be conceded that the allowance is *prima facie* evidence of the validity of the claim, as against the heir, he is entitled to overcome the *prima facie* case by proof on the hearing of a petition for the sale of real estate. In this case, the heirs, established affirmatively, that the judgment was never assigned to E. P. Reed; and for the reasons already stated, the claim could not properly be presented and allowed in his name and for his use.

For these reasons, we are of opinion that the judgment was improperly allowed as a claim against the estate, and that the order for the sale of real estate is erroneous, in so far as it directs the property to be sold for the satisfaction of this judgment.

The question whether the claims which were properly allowed, should bear interest from the date of their allowance, and if so, at what rate, has not been discussed by counsel, and perhaps

does not properly arise on this appeal, and we therefore express no opinion on it. We see no other error in the record.

Order reversed and cause remanded with directions to the court below to modify the order of sale in accordance with this opinion.

(Wallace C. J. being disqualified, took no part in the decision.)

Rhodes J. did not express any opinion.

[Filed August 26, 1878.]

THE BANK OF CALIFORNIA
vs.

THE FERRIS CANAL AND IRRIGATION CO. } No. 6126.

Appeal from the Thirteenth District Court, Marin county.

J. B. CAMPBELL, Judge.

WATER RIGHTS—INJUNCTION.—*Held*, that any other contract to supply water, into which the defendant is about to enter, cannot be construed as a breaking of the contract with plaintiff, and do not constitute an injury to him. A refusal to deliver the water contracted for on the ground of fraudulent contract might be entitled to consideration.

STATEMENT OF FACTS.

This is an action brought on a written contract, made April 9th, 1877, between the defendant and Wm. T. Chapman, by which defendant, in consideration of \$80,000, and an annual payment of fifty dollars per cubic foot per annum, grants to Chapman 300 cubic feet of water per second, to be brought and delivered as required by the defendant, and measured on the land.

By agreement, made May 10th, 1877, between Chapman, and the plaintiff, and the defendant, this water right as to certain lands which Chapman had conveyed to the Bank, was assigned to the Bank.

Another stipulation was made May 11, 1877, confirming the first agreement to the lands sold the bank and the 85½ cubic feet for their irrigation, and rescinding it, as to all others. On October 28, 1877, plaintiff notified defendant to deliver the whole 85½ feet. The Canal Company took its water from King's River, and had, as charged, before making this contract, made others, which, with this, more than exhausted its entire capacity.

Notwithstanding this, defendant, on December 5th, sold further water rights.

Plaintiff's lands—13,400 acres—are very valuable with irrigation, but without are nearly worthless, and they ask an injunction on such further sales of water—which was granted.

Defendants move to dissolve it, and urge that the contracts are null and void for fraud. Also claim water capacity far beyond the amount already sold. Order of court to dissolve the injunction—from which plaintiff appeals.

B. S. Brooks and H. S. Dixon, attorneys for plaintiff and appellant. Wilson & Wilson, and George Norcross of counsel. W. H. Barnes, attorney for defendants and respondents.

BY THE COURT.

The appeal is taken from an order dissolving an injunction. The complaint does not state a cause of action. It is not alleged that the defendant has broken the contract under which the plaintiff claims the eighty-five and one half cubic feet of water, but only that the defendant is about to enter into other contracts for the delivery of water to other persons, whereby the defendant will have contracted for the delivery of more water in the aggregate than the capacity of its ditch will enable it to supply. But even if this be true in point

of fact, it does not follow that the plaintiff will be injured thereby, nor can it be intended that the defendant will fail or refuse to deliver to the plaintiff, the quantity of water claimed in the complaint. The number of contracts in which the defendant is about to enter and the quantity of water it is about to engage to deliver, are therefore matters which do not concern the plaintiff, in a legal point of view.

We think that there is nothing in the complaint entitling the plaintiff to an injunction, and that the injunction was correctly dissolved.

It is proper to remark however, that this disposition of the appeal in no way effects the substantial rights, if any, of the plaintiff, to the water in question, and that the defense set up in the answer, or attempted to be set up, to the effect that the contract between Chapman and the defendant was fraudulent, does not constitute an element of the judgment rendered here. If the defendant should refuse to deliver the water claimed by the plaintiff, and should seek to justify the refusal by setting up that the contract with Chapman was fraudulent in its character, it will then be proper to consider of that defense.

Order affirmed.

(Filed August 26, 1878.)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

WM. COLLINS, Defendant and Appel.

No. 10,366

Appeal from the County Court of Colusa county,
F. L. HATON, COUNTY JUDGE.

BURGLARY—INSTRUCTIONS—Held, that if the money taken was taken by the pretended accomplice in pursuance of a previously arranged plan with the Sheriff, solely to entrap the defendant, no burglary was committed, for want of felonious intent on the part of the accomplice. If it were burglary, the Sheriff would be privy to the offense.

STATEMENT OF FACTS.

The defendant was indicted April 2, 1878, by the Grand Jury of Colusa county, for burglary, committed March 31st, by entering the room of one Pedro Velardi, with intent to commit larceny. Defendant demurred. First—On the grounds of non-compliance with Secs. 960-51-52 of Penal Code, as it does not state whether committed by day or night. Second—Does not state the facts contributing to the crime clearly enough for him to plead and defend. The demurrer was overruled, and the trial proceeded by jury, and a verdict rendered of burglary in the first degree. Motion was made for a new trial, which was denied; and defendant sentenced to 4 years in the State Prison, on April 20, 1878.

Defendant appealed from the judgment and order denying motion for new trial.

The other sufficient facts are stated in the opinion, as already published.

Jackson, Dist. Attorney, assisted by Richard Baynes, for the People. John C. Denel and A. L. Hart, attorneys for defendant.

BY THE COURT.

There was evidence tending strongly to show that the defendant requested Parnell to enter a certain building in the night time and to steal therefrom a sum of money which he knew to be concealed there; and that the money, when stolen, should be divided between them. The evidence also tended to prove, that instead of accepting and acting upon this proposal, Parnell immediately informed the Sheriff of it, who, after consultation with the District Attorney, advised Parnell to pretend to

the defendant, that he accepted the proposition and would carry out the enterprise. It was thereupon agreed between Parnell and the Sheriff, that when the money was taken, it should be marked with acid so that it could be identified; and that when the money was delivered to the defendant, a signal should be given by Parnell to enable the Sheriff to arrest the defendant with the money in his possession. The evidence tended to prove that this programme, as agreed upon by Parnell and the Sheriff, was carried into effect; that Parnell entered the building, secured the money, marked it with acid, delivered a part of it to the defendant, gave the signal as agreed upon, and the Sheriff thereupon arrested the defendant with the money in his possession.

On this state of the evidence the court instructed the jury that if it was agreed between Parnell and the defendant that the former should enter the building and steal the money, to be divided between them, and if in pursuance of the agreement, Parnell did enter the building and take the money and divide it with the defendant was guilty of burglary, and the jury should so find "without regard as to the part taken in the offense by the witness Parnell or as to the motives or intentions of said Parnell." This instruction was erroneous.

If Parnell entered the building and took the money with no intention to steal it, but only in pursuance of a previously arranged plan between him and the Sheriff, intended solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed, there being no felonious intent in entering the building, or taking the money. If the act of Parnell amounted to burglary, the Sheriff, who counseled and advised it, was privy to the offense; but no one would seriously contend, on the foregoing facts, that the Sheriff was guilty of burglary. The evidence for the prosecution showed that no burglary was committed by Parnell, for the want of a felonious intent, and the defendant could not have been privy to a burglary, unless one was committed.

Judgment and order reversed and cause remanded for a new trial.

(Wallace C. J. did not express an opinion in this case.)

(Filed August 26, 1878.)

WM. N. ANDERSON, AND E. DUBOIS,
Plaintiffs and Respondents,

vs.

WM. T. COLEMAN, Defendant and Appel.

No. 6684

Appeal from Twenty-second (formerly Seventh)
District Court, Marin County.

JACKSON TRIPLE, JUDGE.

MALICIOUS INJUNCTION—DAMAGES—Action for malicious prosecution can be sustained, only when malice, and want of probable cause, concur. If either be wanting, it must fail.

STATEMENT OF FACTS.

This was an action brought by plaintiff (on March 20, 1877,) for damages, for an alleged malicious injunction sued out by defendant, without probable cause against the plaintiffs, who were butchers at San Rafael as the firm of "Anderson & Dubois."

That injunction was brought to restrain them from erecting any slaughter-house or pens, or doing any such business on any lot claimed by them in Block No. 1 of "Picnic Valley Tract" in Marin county.

It was served on them on December 23, 1874 and was in force till November 15, 1875, when it

was dissolved by the court, and, on appeal to the Supreme Court, affirmed. These plaintiffs were owners in fee of said Block No. 1, and claimed great costs and loss and damages by the injunction—having paid \$1,000 counsel fees, and sustained damages, \$5,000, in the suspension of their business—hence claim damages \$6,000. For answer, defendant makes full denial, except that the injunction was in force to March 9, 1875 (when it was dissolved); and pleads that the cause of action is fully barred by Section 399, C. C. P.

Cause tried by jury, and a verdict for plaintiffs, for \$1,012, and costs of suit.

Defendant moved for a new trial, upon a statement of the case, which was denied, and he appealed on April 20, 1878, from the judgment and order.

L. E. Pratt, and T. H. Hansen, attorneys for plaintiffs and respondents. E. B. Nelson, and B. K. Greene, attorneys for defendant and appellant.

BY THE COURT.

Irrespective of the other points relied upon by the appellant and which it is not necessary to notice now, we are satisfied that there was error in the refusal of the court below to give the second instruction asked by the defendant and refused by the court. That instruction, as asked, was as follows: "Second—If the defendant instituted the action against W. W. Anderson and E. Dubois, to obtain an injunction in good faith, without malice, and with no other motive than to protect his own property from threatened injury, the plaintiffs cannot, in this action, recover against him."

In order to sustain an action for malicious prosecution, malice and want of probable cause must concur. If either of these be wanting, the action must fail. This is the settled rule, and was conceded by the counsel for the respondents at the argument. Now was the error in this respect cured by the other instructions given at the trial.

Judgment and order denying a new trial reversed and cause remanded.

[Filed August 26, 1878.]

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.
BENJAMIN VAN DELLEN, Defendant and
Appellant.

No. 10,287.

Appeal from the County Court of Santa Barbara
County.

JUDGES.

FEELING - INSTRUCTIONS - DEFINITIONS - ETC. § 16, PENAL CODE DEFINED.—It is provided to provide a punishment for those who kill, by some substance or liquid capable of destroying life. The act of administering a substance that has not the capacity of destroying life, not to be construed as an intent to kill. The omission of that quality or capacity from the definition in the instruction given at request of the prosecution held erroneous.

STATEMENT OF FACTS.

The defendant was indicted, at the December term of 1877, of the County Court, for "administering a poisonous and noxious substance to one Henry Warmstead." . . . "on the 7th day of November, 1877, with the intent feloniously and of malice aforethought to kill."

Upon arraignment the defendant demurred on December 4th, (upon several grounds) which was overruled, and defendant pleaded "not guilty." Cause tried by jury.

It appeared in evidence that the deleterious substance administered was in a pie given by the defendant to the prosecuting witness, who admitted

that they had had some trouble previously.

The instructions given or refused appear sufficiently in the opinion.

A verdict of guilty was returned, upon which, defendant moved for a new trial, on the ground, among others, that it was proved that the pie given did not contain strychnine, the only substance mentioned by any witness as so contained, and hence not proved that it contained any poisonous or noxious substance.

Motion denied, also for arrest of judgment which was overruled, and the defendant sentenced to 10 years in the State Prison; upon which defendant appealed from the orders and judgment on December 27, 1877.

B. F. Thomas, District Attorney, for plaintiff and respondent. Thomas McVick, attorney for defendant and appellant, and Paul A. Wright, of counsel.

BY THE COURT.

The defendant is charged with having administered "a poisonous and noxious substance" to the prosecuting witness. The section under which the indictment was framed is as follows: "Section 216—Every person who, with intent to kill, administers or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the State Prison not less than ten years."

The court instructed the jury that if the defendant gave or administered to Henry Warmstead "either a poisonous or noxious substance, with the intent then and there to kill him, as alleged in the indictment," they must find the defendant guilty. The court defined poisonous and noxious substances as follows: "A poisonous substance is one which has an inherent and deleterious property capable of destroying life. A noxious substance is not necessarily poisonous, but may be a substance which is hurtful and injurious."

Accurate definitions of those terms cannot be readily given, and, perhaps, are impossible, and proximate accuracy is all that may be required in the application of the statute in a given case; but the above definitions omit some of the essential elements of the meaning of those terms, as employed in the statute. A poison is defined by Wharton & Stille (Med. Juris., 1494), as "a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life." A definition stated in 3 Beck's Med. Juris., with approval, is as follows: "A poison is any substance which, when applied to the body externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life." The definition of a poison given by the court would include substances which act upon the system mechanically so as to destroy life. In that respect the definition was too broad; but such substances are, in our opinion, included within the meaning of the words of the statute, "other noxious or destructive substance or liquid."

The noxious or destructive substance or liquid mentioned in the statute, is not merely such as might, when administered, be hurtful and injurious, but, like a poison, it must be capable of destroying life. Pulverized glass or boiling water when administered in sufficient quantities would destroy life, but they are not poisonous. The purpose of the statute is to provide a punishment for attempts to kill, by the means therein mentioned; and in order to bring a case within the statute, it must be proved that the substance or liquid which was administered was capable of destroying life. The intent to kill, could not be inferred from the

act of administering a substance which has not the capacity of destroying life. The omission of that quality or capacity from the definition of a noxious substance as given at the request of the prosecution, rendered it erroneous.
Judgment and order reversed, and cause remanded for a new trial.

Unwritten Decisions.

(Decided August 26, 1878.)

MATTER OF THE ESTATE OF DENNIS SULLIVAN, DECEASED. } No. 6126.

Appeal from the Probate Court, Alameda County. S. G. Nye, Probate Judge.

PROBATE OF WILL—INSUFFICIENT ATTESTATION.

STATEMENT OF CASE.

On May 7, 1878, E. S. Farrelly, and Michael Kerwin, Executors of the will of Dennis Sullivan—who died at San Leandro, on April 30th, preceding, petitioned the Probate Court of Alameda County to admit to Probate the will of the decedent, dated April 29, 1878.

The minor heirs resisted the application on the ground that the will was not legally attested, in that one of the two witnesses, subscribing by his mark, had no witness to his signature, (made by an X.)

To this the petitioners demurred which, was overruled, and the court decided that the signature of the witness, Bernard Glancey, not being witnessed by Nugent, who wrote the name for him—for that reason and no other—the will was not executed according to law, and admission to probate refused.

Judgment and order affirmed. Remittitur forthwith.

Montgomery & Martin, attorneys for appellant. *N. Hamilton*, attorney for respondents.

Unwritten Decisions.

(Decided August 26, 1878.)

BEN. LYNN, Plaintiff and Respondent, }
vs. }
THE LOS ANGELES COUNTY BANK, De- } No. 6364.
fendant and Appellant.

Appeal from the Seventeenth District Court, Los Angeles County. SEPULVEDA, JUDGE.

BANK DEPOSITS—LIABILITY OF BANKS ON COLLECTIONS.

STATEMENT OF THE CASE.

This action was brought to recover from defendant the sum of \$761 25, claimed to have been deposited in said bank, on November 27, 1875, as a term deposit, on which interest should be allowed at the rate of 10 per cent. per annum, if left in for 6 months. On December 28th, plaintiff gave the bank notice of withdrawal in 6 months, and at that time did demand it, and tendered a pass book, the evidence of its deposit, but it was refused. The bank denied the debt, but admitted that the plaintiff delivered to them a check drawn on Phillips & Chandler, Oakland, by themselves, to the order of plaintiff for the sum in question, which the bank took for collection, and forwarded the same day, to the Anglo California Bank in San Francisco—having no correspondent in Oakland.

On November 27th notice was received that the check was placed to defendant's credit, from which defendant understood that it had been paid, and

thereupon issued a pass book of credit to plaintiff for the amount. But it was all a mistake, as the check was not, and never had been paid, and it was through no fault or neglect of defendant, and that no real consideration for the credit had ever been received.

The said check had been presented to the drawers at Oakland and payment refused for want of funds, and duly protested on November 27, 1875, and thereupon defendant rescinded the contract with plaintiff, offered to restore the check, and demanded the pass book of deposit, and cancelled the credit on the books of the bank; and now claims \$7 costs of protest fees, and \$15 24 damages.

To this answer plaintiff demurred, which was overruled, and a jury on the trial gave a verdict for the plaintiff.

The matter was then referred to Geo. C. Gibbs, who reported findings in accordance with the above; and further, that the Anglo-California bank charged 75 cents for collecting the check, and that their correspondent in Oakland, the "Union National Gold Bank," neglected for some 10 days, to present the check to the drawers for payment, for which defendant was liable, through its agents or correspondents, to the amount of the draft. And that the issuance of the pass book to plaintiff operated to make him *surety* for its payment, upon which he was entitled to notice of non-payment *strictly* as required by law—in order to charge him as such endorser.

The notices of dishonor were not sent in time required by law, hence the check has become the property of the defendant, and he is liable to plaintiff for the amount, \$905 75, for which sum judgment was given.

Motion was made on the judgment roll by defendant to set aside the judgment, which was denied.

Defendant then appealed on November 30, 1877. Judgment and order now affirmed.

Graham & McDaniel attorneys for plaintiff and respondent. *R. M. Widney* attorney for defendant and appellant.

Unwritten Decisions.

[Decided August 1, 1878.]

MATTER OF THE ESTATE OF DAVID GHARKY, DECEASED.

DAVID GHARKY }
vs. } No. 6056.

JOHN WERNER, ET ALA.

Appeal from Probate Court of Santa Cruz County.

A. CRAIG, Judge.

CONTEST OF WILL—HABITUAL INTemperance—INSANE PREJUDICE—STATEMENT OF THE CASE.

John Werner made application to probate the alleged will of David Gharky, deceased, who died August 18, 1877, at Santa Cruz, and left property of the amount of over \$1,000.

It was willed in trust to several certain persons, and one half the per annual income, was to be paid to his son David Gharky, semi-annually, during life, and after his death to his wife, and after that to the children, if any, and the other half of the annual income to the support of such poor people of Santa Cruz county as the trustees might name, and also the first named half to the same object, after the death of the heirs. Half the principal or property might be invested in land and buildings near Santa Cruz to aid in carrying out his last purpose.

Of this will, John Werner was appointed executor.

If any child of the son David attained majority, then the one-half the estate to be theirs in fee absolute. In a codicil, dated May 19, 1873, the provisions in favor of the son David were transferred to his wife, Mary E., and he to have \$10 only. Mary E. died, leaving two children—a son and a daughter—and all her share was then transferred to them, and the son David to receive \$70 per month during life. Date of last codicil August 18, 1877.

The petition for probate of the will, dated August 18, 1877, shows property about \$34,000.

The son, David Garick, contests the will on the ground that the father was incompetent to make the will or codicils, by reason of habitual intemperance, and an insane delusion as to the son, and under undue influence of passions and prejudice against him. All of which the defendant denies.

Case tried October 24, 1877, by a jury, and the will sustained, and Warner confirmed as executor. Motion made for a new trial, with a bill of exceptions of the case, which was denied, and an appeal taken by plaintiff on February 26, 1878, from the judgment and the order denying new trial.

Appellant gave two notices of intention to move for a new trial. One after the special verdict of the jury, stating that the motion would be made on a statement, and the other after the judgment admitting the will to probate, which stated that the motion would be made on a bill of exceptions. Before the hearing of the motion, the Probate Court made an order directing the Clerk to insert "bill of exceptions" for "statement" in the first notice. This correction was not made until after the transcript was filed in this court, when a certified copy of the first notice as corrected was filed, and appellant moved to correct the transcript accordingly. This motion was denied on the ground that the lower court could not make the change pending the appeal.

Respondents objected to the bill of exceptions because it did not appear to have been settled on notice; but this court said that it would be presumed that, whatever was necessary to have been done was done prior to the signing of the bill of exceptions. Respondents objected to hearing the appeal from the order denying motion for a new trial, because the statement mentioned in the first notice was not filed. It was held that, as the bill of exceptions formed a part of the judgment roll, whatever error was thereby disclosed could be considered, and that it was not necessary that a statement should have been filed.

At the trial respondents offered in evidence the deposition of Greeley, taken under the third subdivision of section 2021 of Code of Civil Procedure. Appellant objected to it, because there was no proof that the witness is absent from the country or is infirm or

dead. Objection overruled and deposition read in evidence. This testimony tended to show that deceased, at the time he signed the last codicil, thoroughly understood what he was doing, and was of sound and disposing mind and memory. Respondent argued here that as the bill of exceptions did not show that no proof was offered of the absence of the witness, it would be presumed that such proof was made, and that, if the deposition was erroneously admitted, the transcript shows that appellant could not have been injured thereby. It was held, First, that the admission of the deposition was *prima facie* erroneous, and that it devolves on respondents to show that the requisite proof was made of the absence of the witness; and Second, that it was no answer to this error to say that the appellant was not thereby injured; that, as this is not a mere contest between litigants, as in ordinary cases, but a proceeding *in rem* and binding on all the world, the proceeding must be without error.

Judgment and order reversed, and cause remanded for a new trial. Remitted without costs.

F. Adams and Charles B. Fonger, attorneys for contestant and appellant. W. D. Storey, attorney for respondent.

Unwritten Decisions.

[No. 10,325.]—Decided Aug. 5, 1878.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent.

vs.

WALTER CARRICK, Defendant and App't.

Appeal from the Ninth District Court,
Siskiyou County.

ROSBOROUGH, Judge.

MURDER—ACCESSORY—EVIDENCE OF AN ACCOMPLICE.—
Court held on the day of the State Judicial Election.

STATEMENT OF THE CASE.

The defendant was indicted, by the Grand Jury of Siskiyou County, along with one Indian Jim, and David Carrick,—for the murder of Walter Scott, who was shot and mortally wounded by the Indian.

He was hired to do the deed by David Carrick,—Walter assisting the murderer to catch the horse, upon which he rode to the spot where it was done, and loading and delivering to him the gun, and giving him food to eat while on his way. Upon arraignment before the Ninth District Court, on June 6, 1877, Jim pleaded guilty, and David and Walter Carrick not guilty. Upon trial—commenced October 15th—Jim, and Lucy, an In-

dian woman, testified on the part of the State.

The verdict of the Jury was murder in the first degree, fixing the punishment at imprisonment for life.

Defendant's counsel objected to the Court's pronouncing judgment, on the ground that the verdict was illegal, the Court having no jurisdiction to receive it or render judgment thereon,—said Court having performed its judicial functions in the case, on the 17th of October, a non-judicial day, the day on which the judicial election of California was held.

Moved further that he be discharged from custody, in that he could not be tried the second time for the same offense.

A motion for a new trial was made and overruled, and sentence was passed upon him in accordance with the verdict; and an appeal taken.

Among defendant's instructions it was held that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence, as it should be received with distrust.

Judgment and order affirmed, remittitur forthwith.

C. Edgerton, attorney for appellant.

Attorney-General for respondent.

[No. 10,344.—Decided Aug. 5, 1878.]

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs and Respondents.

vs.

GEO. BUTTS, Defendant and Appellant.

Appeal from the Fourteenth District Court, Nevada County.

REARDON, Judge.

MURDER—PLEA OF INSANITY.—

STATEMENT OF THE CASE.

This was a trial and conviction for murder in the first degree.

The defendant and his victim had been partners in a mining operation.

On the morning of September 6th, 1877, having previously had some disagreement in their work, they met at their mining shaft, and defendant, who had brought a shot gun with him, threatened to shoot the first man who should attempt to descend, unless he were first paid \$25.00 due him. Deceased then left the ground, (with two parties he had employed to assist him), and went to a house, about a half mile distant, where the defendant soon followed with the gun still in hand; angry words ensued, and defendant

tried to shoot deceased, when a witness named Rollins interfered and took the gun away, whereupon a scuffle took place, during which defendant drew a butcher knife from his boot leg, and inflicted three wounds upon deceased, from which death immediately resulted. Upon the trial the defense attempted to prove insanity, upon which point there was conflicting testimony, but the jury ignored it entirely. This is made a ground of appeal,—also errors on other points, particularly as to instructions asked.

The judgment and order are affirmed—Remittitur forthwith.

E. H. Gaylor, District Attorney for Nevada County, attorney for the prosecution.

George S. Hupp, attorney for defendant and appellant.

We cannot forbear rescuing from the dusty archives of the law, the subjoined peroration of the eloquent counsel for the defense:—

"If it were permitted me to travel somewhat beyond the record, and to present to the consideration of your Honors a series of facts which have come to the surface since the trial of this cause, and which by the reason of the local obscurity and impecuniosity of the defendant, and the utter friendlessness which in this country seems almost always to follow in the wake of impecuniosity, I have an abounding confidence that I could win that civic wreath which under the iron law of old Rome it was the custom to bestow upon him who should save the life of a citizen.

If I were arguing a cause involving the ownership of a horse, of the value of three hundred dollars, it might be that I could invoke the aid of Equity, for the purpose of correcting the Law wherein it is 'defective by reason of its universality';—but in the discussion of an issue upon which the unimportant matter of a human life depends, I am nailed down to the cold and technical rules of the law, and must accept the situation."

'Tis true—'tis pity!

And a pity 'tis—'tis true."

SUIT FOR ATTORNEY'S FEES.

A Friendly Lawyer and an Impecunious Client.

An action touching the relative rights of attorney and clients, in the matter of attorney's fees, was tried in the Municipal Court of Appeals a few days ago. It was brought by an attorney of this city against a former client, to recover \$225 for services as attor-

ney and counselor. Judgment was rendered for plaintiff in the Justices' Court, for \$125. The case was appealed and tried *de novo* in the Court of Appeals.

This morning Judge Freelon rendered a decision in the case of which the following are the points: The plaintiff testified that he prepared papers in bankruptcy for the defendant, but before commencing proceedings his client decided not to go on. The charge for this service was \$75. He drew two mortgages and one release for the defendant, charge \$25. He defended a suit in the Fifteenth District Court, and charged \$25 for trying a case in the Justices' Court, and for professional advice for a number of years, he charged \$25. He claimed that his services were reasonably worth \$225, although he had once rendered a bill for \$75, by reason of old acquaintanceship and to keep the defendant as a client. Two respectable members of the bar testified that the services were reasonably worth the same charge. Another member of good standing testified that the services in the lower court were only worth \$10. The plaintiff kept no books and had no memoranda of his services.

The defendant testified that plaintiff rendered him an itemized bill, which had been lost, in which there were only three items, viz: \$25 for services in the District Court; \$25 for drawing papers, and \$25 for Justice Court services; that no services were rendered in bankruptcy; that he asked what it would cost to go through bankruptcy, and on being told that it would cost \$150, he said he did not have the money. And further that the plaintiff had not rendered him any professional services outside of the cases named. A witness for the defense testified that he had the mortgages and releases in question drawn, and paid for the work.

Judge Freelon remarked that it was easy by the application of recognized principles of law to give judgment on the above statements which would be mathematically correct, but whether such judgment would ren-

der exact justice between the parties the conflict of testimony makes less absolutely certain. It is competent to consider the first bill, as to whether the services claimed were rendered, and their value, although plaintiff is not bound by it. The practice of doing a multifarious law business, without keeping any books, is certainly inconvenient and not general. Without such books plaintiff puts his unaided memory in regard to transactions of little importance to him, and mixed up with the affairs of a large, general business, against the memory of a client intent upon a single point of great interest to him, and upon which he would not be likely to be mistaken in point of fact. Plaintiff is not sure whether the bill rendered was itemized or not. The defendant swears positively that it was; that there was no charge for the bankruptcy matter. There is clearly a preponderance of evidence against the charge for \$75, and it should not be allowed. The testimony of the defendant in regard to the \$25 mortgage charge is strongly corroborated by his witness. This charge also ought not to be allowed. The preponderance of expert proof is that \$10 is a fair fee for services in trying a case in the Justice's Court, involving \$41, and that sum will be allowed. No evidence was introduced to show that \$75 charged for District Court services was an unreasonable amount. Plaintiff testifies that he rendered general professional services for a number of years, which the defendant denies *in toto*. It is incumbent on the plaintiff to show what those services were. The \$25 charge for general services should not be allowed. It results that plaintiff should have judgment for \$85, and it is so ordered.

Book Notice. and Review.

Just Received, from Messrs. Robt. Clarke & Co., Cincinnati, Ohio, two more parts of the *advance sheets* of the "Ohio State Reports"—

Part 6. of Vol. 30., and Part 5. of Vol. 31. The Part 6. contains the *Index and Table of Cases*,—completing Vol. 30., with 740 pages; and the Bar can welcome it as a valuable accession to the Legal Literature of the Union. The volume is always open to inspection on the RECORD Table.

CALIFORNIA LEGAL RECORD.

VOL. I.

SATURDAY, SEPTEMBER 7, 1878.

No. 23.

Legal Notes.

"SUPREME COURT RECORD."

Under this new head we shall henceforth note each week (commencing last week) every *Appeal Dismissed*; or *continued for the term*; *Rehearing*;—and "Admitted to Practice;" which, with our report of every *Decision and Opinion rendered*, will give the *final disposition of every case on the calendar for the term.*

SUPREME COURT CALENDAR.

A circular, of which the following is a copy, has been forwarded to county clerks and attorneys

CLERK'S OFFICE, SUPREME COURT, }
SAN FRANCISCO, September 2, 1878. }

You will please take notice that the Calendar of this Court for the October Term at Los Angeles, will be made upon the first day of September, and will consist of all cases from the counties of Santa Barbara, Ventura, Kern, Inyo, San Bernardino, San Diego, and Los Angeles.

The calendar for the November term, at Sacramento, will be made upon the 15th day of October, and will consist of cases from the counties of Sacramento, Yolo, El Dorado, Alameda, Colusa, Nevada, Yuba, Sierra, Sutter, Tehama, Placer, Butte, Plumas, Shasta, Siskiyou, Modoc, Lassen and Trinity.

Cases from other counties may be placed on either calendar by stipulation, said stipulation to be filed by the Clerk, at his office in San Francisco, on or before the time above mentioned for the making up of the respective calendars.

By order of the Chief Justice,

D. B. WOODS, Clerk.

The First California Woman Lawyer.

As will be remembered by many, the bill granting women the right to practice law in this State was passed near the close of the last session of the Legislature; and so near did it come to being stowed away in the Governor's capacious pockets, that his official signature was not attached thereto until within two minutes of midnight of the last day of the session. Although many friends of the measure in and out of the Legislature, labored earnestly for the bill, its passage, and especially its final approval by the Governor, were no doubt largely due to the personal efforts of Mrs. Clara S. Folts, a lady law student of this city, at that time well advanced in her readings, and who had determined upon the profession of law as a means of honorable livelihood. With the passage of

the bill the lady entered upon her readings with renewed zeal. Possessing a remarkably retentive memory, coupled with intellectual breadth, and a ready comprehension and natural taste for abstruse subjects, her progress, as might have been expected, has been rapid and thorough. In fact, but few male students have been able to accomplish like proficiency in so short a period. And when the fact is taken into consideration that Mrs. Folts has a family of five small children to care for, and for most of the time she has done her housework unassisted, and occasionally has been obliged to take to the lecture field as a means of piecing out her meagre income, it will be generally conceded that she is justly entitled to the honors just conferred on her by our District Court in admitting her to the bar of said Court as a full-fledged attorney. The Committee appointed to examine her consisted of some of our first lawyers, who subjected her to a thorough test of her legal knowledge, and who unanimously certified to her entire fitness for advancement. Mrs. Folts is the first woman admitted to the bar of this State.—*San Jose Mercury, September 5th.*

HOW A STANDING COLLAR WON A SUIT.

All things are fair, so it is generally thought, in war, a horse trade, or in a law case. It is probably on the bad rule that the late President Lincoln acted when he defeated an antagonist before a jury. He was often pitted against eminent lawyers during trials in the Sangamon county Circuit Court. On one occasion he was opposed to a very able advocate, who made a powerful, eloquent and convincing speech to the jury, and Mr. Lincoln saw that it had been very effective on the minds of the jury. The gentleman, moreover, was a man who was very precise in his dress, as well as manner and oratory. But Mr. Lincoln had been observing him, and saw a flaw in his usually faultless attire. "Gentlemen of the jury," said "Old Abe," when he rose to speak, "the gentleman who has just spoken has made a strong argument. He has quoted the law and evidence, and it is not for me to say that he is wrong. He may be correct in all he has said. But I want you to get a good look at him. Look especially at the upper half, and then, gentlemen, tell me if any man who comes before you with his standing collar buttoned 'wrong end to,' with the points sticking away out behind his ears, may not be altogether mistaken in all his arguments." The plan was successful. Mr. Lincoln had broken the spell which the eloquence of his opponent had thrown over the jury.—*New York Dispatch.*

Ex-Collector Austin's Protested Tax Money.

The recent decisions of the Supreme Court in the protested tax cases, apply to five of the seven cases appealed. Ex-Tax Collector Austin at one time held \$400,000 of taxes paid under protest. Under former decisions he paid about \$124,000 over to the City Treasurer, leaving \$276,000 still in his possession. Under the recent decisions he will be obliged to pay into the treasury at least one-half of the remaining sum of \$276,000. When the second payment is made he will have paid all protested real estate taxes. The cases pending relate to protested taxes on solvent debts and personal property. In all these suits a victory for the Tax Collector is a victory for the city. If the plaintiffs who bring suits to compel Mr. Austin to return money paid to him as Tax Collector under protest, fail to sustain their positions, it follows that the Collector legally collected the money, and that the sums so collected belong to the city.

A few weeks ago Mr. Austin assured the Finance Committee of the Board of Supervisors that the money was in his possession, and that he only awaited the decision of the Supreme Court to make the payment.

Ex-Tax Collector Alexander Austin seems to be perfectly satisfied with the termination of the suits, and says that he supposes all the back actions to compel him to pay money to the persons who paid it in will fall to the ground now. He says the money due the city, still remaining in his hands, amounting, according to Mr. Austin's representations, to \$300,000, will be paid into the treasury whenever the Courts so order. As the suits now stand, the plaintiffs have a few days to apply for a hearing. If they do not apply within the time given, or if they apply and are refused, a settlement will be made with the Treasurer. Mr. Austin's information as to the right of the plaintiffs to apply for a rehearing agrees with the statement of Attorney Burnett.

Mr. Austin says he has paid over to the city already about \$300,000 of protested taxes, and that there still remains in his hands about \$260,000.

ALAMEDA COUNTY JUDGESHIP.—Honorable Stephen G. Nye, County Judge of Alameda County, resigned his office about the 1st of August, the resignation taking effect on the 1st of September. Hon. R. A. Redman was appointed as his successor.

Judge Nye has held the office of County

Judge for the past eleven years. Mr. Redman has been Court Commissioner of Alameda County for the last four years, and once represented Santa Clara and Alameda Counties in the State Senate.

Robt. L. McKee, Esq., son of Judge McKee, has been appointed Court Commissioner, vice Redman, Resigned.

A THREATENING LETTER AND ITS RESULTS.—H. N. Marquand is charged with felony in trying to extort money from J. L. Hussey, by means of the following letter:

BERKELEY, Cal., January 30, 1878.

J. F. Hussey—SIR: You have acted so dilatory and regardless of my rights that if you don't answer this by an order on some one here, to pay me the balance you owe me, and interpet, I will, fifteen days after this date, give you an airing in my paper, that has now a circulation of over 10,000, principally in San Francisco, per month. I have heard much about you that I really tried to disbelieve, but I may use it if you don't come to time without delay. Yours, truly,

H. N. MARQUAND.

Editor Berkeley Advocate.

Marquand was this morning held to answer by Judge Louderback, in \$1,000 bail.

Bulletin, August 13.

EXTRADITION WITH MEXICO.

The subject of extradition with Mexico is one of considerable importance in the States of our Union bordering on that country, and on that account the decision of the Mexican Supreme Court, which has just been communicated to the Government authorities at Washington, that the Mexican law will permit the delivery up of offenders, upon an application made by the authorities of one of our States, will be received with much satisfaction here. In the case passed upon, the authorities of the State of Texas applied to those of an adjoining Mexican State for the surrender of two fugitives, who were charged with murder in Texas. An inferior Mexican court, however, ordered the discharge of these persons from custody, but the Supreme Court, by a vote of nine to five, reversed this decision, and ordered the surrender.—*Albany Law Journal.*

The Lay of the Land.

Some lawyers think that a decision delivered by the Supreme Court of the United States, at the October term in 1876, has some bearing on the title agitation, which has been so suddenly sprung on the community. The case was entitled *Francis O. French, plaintiff, in error, vs. Robert W. Fyan, James L. Ruth and P. L. Barford*. It was an appeal from the Circuit Court of Missouri, and the principle laid down is thus set forth in the syllabus: "Where, as in the act granting swamp lands to the States, it is made the duty of an officer (the Secretary of the Interior) to identify these lands and make lists and issue patents for them, a patent so issued cannot be impeached in an action at law by showing that the land which it conveys was not in fact swamp and overflowed land." Justice Miller, who delivered the decision of the Court, said: "This Court has decided more than once that the Swamp Land act was a grant *in present*, by which the title to these lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent therefore, which is the evidence that the lands contained in it had been identified as swamp lands under that Act, relates back and gives certainty to the title as of the date of the grant." Further on, Justice Miller held that the title for these lands passed to States, which had not been admitted at the time of its passage, on the date of their admission, which in California was the 9th day of September, 1850.

This decision has already been referred to by one of the correspondents of the *Bulletin* who has taken part in the discussion which is now in progress. A peculiarity about it is that it develops a divergence of opinion between Justice Field and the court of which he is a member. Justice Miller, in the course of the decision, said: "The learned Judge of this Court who presides in the California Circuit, has called our attention to a series of decisions of the Supreme Court of that State in regard to this swamp land grant, commencing with 27 *California R.*, 87, in which a different doctrine is announced. But with all the respect we have for that learned Court, we are unable to concur in the views therein expressed. The principle we have laid down is in harmony with the system which governs the relations of the Courts to the officers of the Executive Depart-

ment; especially those having charge of the public lands, as we have repeatedly decided, and we must abide by it."

If there be any swamp or overflowed lands as contradistinguished from submerged lands up to high water mark which the State owned by virtue of her sovereignty, no *parole* testimony can be taken in opposition to the patent. We do little more in the matter than present the facts. Lawyers are divided in opinion as to whether there were any swamp and overflowed lands in this city within the meaning of the act generally known as the Arkansas act. If there were, this decision clearly applies, and no change of boundary from that set forth in the patent can be brought about except perhaps by the dextrous process of drawing down another grant over it. Whether the legal devil can be whipped around the stump after this fashion is a problem with which the lay mind will be likely to wrestle in vain.—*Daily Bulletin*, September 6th.

The Monetary Conference.

PARIS, AUGUST 18th.—The Monetary Conference is expected to terminate Wednesday. The Delegates will dine at the Elysee Palace on Tuesday.

At the sitting to-day, Grossbeck urged resumption of free mintage of silver, on the ground that circumstances have greatly altered since its suspension by the Latin Union. In Germany the stock is greatly reduced, and the Asiatic demand has revived. The Swiss representative contended that if the Latin Union had not suspended free mintage of silver, the countries composing it would have been obliged by demotedized German stocks. He also feared that the Nevada and South American supply might increase. The Belgian representative pointed out the impossibility of fixing the value of silver by legislation. Lecombe, of the English delegation, pointed out that silver was liable to great fluctuations, and these might be aggravated by changes in the currency laws of various countries. No resolution of the Congress, he said, could effectively lessen the evil, as every Government would study its national interests only. Horror of the American delegation, concenterated England and France on having changed the opinion they held in 1867 in favor of the demonetization of silver.

INTERNATIONAL CONGRESS OF WEIGHTS AND MEASURES.—PARIS, September 5th.—The International Congress on Weights, Measures and Coins, yesterday unanimously adopted a resolution deploring the fact that England, Russia and the United States had not yet adopted the Metric system. American and English delegates afterwards passed a resolution petitioning the English and American Governments to appoint a mixed Commission to consider the adoption of the Metric system by both countries, the rates between gold and silver to be regulated solely by their commercial value, and silver not to be a legal tender for debts over £20.

SUPREME COURT OF CALIFORNIA.

JULY TERM, 1878.

(Filed September 2, 1878.)

ODD FELLOWS' SAVINGS AND COMMERCIAL
BANK, Plaintiff and Respondent,

vs.

MARGARET HARRIGAN, et al.,
Defendant and Appellant.

No. 5948.

Appeal from Sixth District Court, Sacramento
County.

DENSON, Judge.

REHEAT OF REDEMPTION—A sale of real estate, upon a decree of court, having been made by commission-ers, and a deed delivered, and the sale afterwards confirmed by order of the court, and no appeal being taken from that order, *Held*, that the effect of such order of confirmation is to deny the right of redemption from the sale.

STATEMENT OF FACTS.

A judgment and decree had been given in favor of plaintiff for \$8,189.50 and costs, against defendant, and that certain real estate be sold, the proceeds to be applied in payment of it and certain other claims. This was done, by two commissioners appointed, and the property brought \$10,000.

A deed was given, which was confirmed by order of court.

A small balance was left for defendant after paying all claims; but she refused to vacate the premises, and was ordered to show cause, upon which she filed an affidavit that the sale was not properly made by the commissioners, as they did not use due diligence in advertising the property, and that she was entitled to six months in which to redeem. A writ of assistance for her removal was granted the purchaser, with a stay of 15 days. She appealed from this order.

D. W. Welby, attorney for plaintiff and respondent. R. P. & H. N. Unsworth, attorneys for defendant and appellant.

BY THE COURT.

Whatever may be the correct interpretation of the decree as originally rendered, so far as the right of the appellant to redeem is involved, it appears that the Commissioners subsequently reported to the court that they had delivered a deed to the purchaser upon making the sale.

This action of the Commissioners was there-upon approved by the court below and an order was entered, confirming their proceedings. From this order no appeal appears to have been taken, and we think that the effect of the order of confirmation, irrespective of the language of the decree, was to deny the right of the appellant to redeem from the sale.

Order affirmed. Remittitur forthwith.

(Filed September 2, 1878.)

MATTER OF THE ESTATE OF } No. 5954.
JARED BUNYON. } No. 5953.

Appeal from the Probate Court of Sacramento
County.

R. C. CLARK, Probate Judge, and A. C. BROWN, Act-
ing Judge.

PROBATE PROCEEDINGS—IRREGULARITIES.

STATEMENT OF FACTS.

Jared Bunyon died April 15, 1876, leaving a widow, Cynthia A. Bunyon, and a will, containing bequests to seven legatees, all of adult age. The will was admitted to probate on June 5, 1876, and

no executor having been named, letters of administration were granted to the widow, on June 19th, who entered on her duties, and on June 11, 1877, filed her annual account, showing a balance between moneys received and expended of \$2,782.98, and a mortgage of \$18,777 on hand against one S. W. Ralston, due in two years from December 18, 1876 with interest at 10 per cent per annum.

June 25, 1877, was set by Judge Clark for the settlement of the account. On that day, Judge A. C. Brown, of Amador county, was acting for Judge Clark, and upon the calling of the probate cases, this was not answered to by the administratrix or her attorney, and the court closed probate proceedings, and took up County Court matters, after which, Col. Henry Starr, her attorney, called the account, and no objection or contest appearing, it was allowed and settled by order.

A few days after, the legatees gave notice of a motion to vacate and set aside this settlement, on the ground of surprise and mistake, and desiring to contest certain accounts allowed by the administratrix.

Motion heard August 6th, and court ordered the settlement vacated unless the administratrix would consent to withdraw certain credits which she did, and the court, on August 20th, modified the original order of settlement accordingly.

To this the legatees excepted, claiming that it should be set aside and vacated, as Judge Brown was not qualified to act, in the case, and asked a new trial. This not being granted, appeal was taken by the legatees on August 17, 1877.

This is the 4th appeal to the Supreme Court in the matter of this estate.

Henry Starr, attorney for administratrix, and respondent. Ben. Bullard Jr., J. W. Armstrong, and M. C. Hanson, attorneys for the legatees and appellants.

BY THE COURT.

It appears by the record in each of these causes, that by reason of irregularities occurring in the proceedings had below, the parties have not been heard, and no proper settlement of the accounts has been had; and in each case the order must be reversed, and the cause remanded. Remittitur forthwith.

(Filed September 2, 1878.)

RANOMA HILLIARD,
Plaintiff and Respondent,
vs.
RONUALDO PACHECO, ET ALA.
Defendants and Appellants. } No. 3,341.

Appeal from First District Court, San Luis Obispo
County.

PABLO DE GUERRA, Judge.

TO QUERT TITLE—FROPER CONSTRUCTION OF WILL.—A
Contingent Life Estate construed as absolute title
in fee.

STATEMENT OF FACTS.

John Wilson, who died October 13, 1851, had, by will of February 4, 1850, devised to the plaintiff, his daughter, and wife of Frederick Hilliard, a life interest in one-half his estate of the Rancho Pecho-y-Lalay, two square leagues—and Rancho Santa Fee—1,000 square yards—all of which is in actual possession of plaintiff. The mother of plaintiff, and wife of the deceased, afterward deeded to plaintiff the other half interest as claimed by her in the estate; and inasmuch as the share willed to her was contingent upon her bodily heirs, she now claims a title in fee simple, absolute, and asks judgment confirming it, as against the defendant, the only surviving execu-

tor of the will, and her own three minor children, in whose interests he claims the estate should be held and managed. Cause tried at January term of 1871, at which defendant, Pacheco, not appearing, W. Murray, Esq., was appointed Guardian ad litem for the minor children, and the court found the facts as above, and a conclusion of law that plaintiff *do* take title in fee absolute, under the rule in Shelly's case, as construed and applied in Norris vs. Hensley (27 Cal., 438.) From this judgment the defendants appealed; and cited many important authorities, on contingent remainders.

Wm. J. Graves, attorney for plaintiff and respondent. Walter Murray, for minors, and O. P. Moore, attorney for appellants.

BY THE COURT.

Upon the authority of Norris vs. Hensley, (27th Cal., R. 438), the judgment is affirmed.

(Filed September 3, 1878.)

JOHN A. WILLS, Plff. and Respondent,
vs.
ALEX. AUSTIN, TAX COLLECTOR OF CITY No. 5545.
AND COUNTY OF SAN FRANCISCO,
Defendant and Appellant.

Appeal from Fifteenth District Court, S. F.
DWINELLE, Judge.

EQUITY—TAXES PAID UNDER PROTEST—LEGAL DURESS
ILLEGAL ASSESSMENT OF STATE TAX OF 1873-4.

The rate of State tax determined by the "Stat. Board of Equalization, under Section 3695, Political Code, by making allowance for delinquency in collection, having been divided illegal, in *Houghton vs. Austin*, 47 Cal., 646, *Held*, that a sale and tax deed under such an assessment would be void on its face, and hence no cloud on a title; and a threat to sell in such a case does not amount to legal duress.

That illegal clause, being blended with the section, all become illegal—not being independent of the rest, and Section 3695, Political Code, was void *per se*, as to taxes that year.

A sale for taxes, or while a part are illegal, makes the whole sale and deed void. Payment of such taxes is deemed voluntary, and of under legal duress—hence cannot be recovered. No need for a new trial.

STATEMENT OF FACTS.

This action, (with 94 others of a similar nature), was brought to recover \$351. taxes paid by plaintiff under protest for the year 1873-4, for illegal assessment, in the action of the State Board of Equalization.

Plaintiff alleges repeated threats of delinquency and sale, with added costs, on the part of defendant, in his official character, and hence, paid under protest, and now demands judgment for return of the money, with interest.

Upon a general denial by defendant, the cause was tried September 10, 1875, and a judgment given for plaintiff for \$350.36.

Defendant moved for a new trial, which was denied, and an appeal taken November 2, 1875, from the order of denial.

Coxes & Drown, Attorneys for plaintiff and Respondent. W. C. Burnett, Attorney for defendant and appellant.

(NOTE.—The three other cases decided with this, are similar in character, but involving different amounts claimed in recovery.)

BY THE COURT.

If the plaintiff's land had been sold by the defendant as Tax-Collector for the alleged taxes, and tax deed had been made to the purchaser, would

the deed have been void on its face? For if so, it would have imposed no cloud on the plaintiff's title, and the threat to sell, would not, under such circumstances, have amounted to legal duress. *Bushnell vs. Story*, 46 Cal., 589. The only authority in law there was for the levy of a State tax for the fiscal year 1873-4, is to be found in Section 3695 of the Political Code as it then stood. That section was under review by this court in the case of *Houghton vs. Austin*, 47 Cal., 646, and it was decided that so much of the section as authorized the State Board of Equalization in determining the rate of the State tax, to make an allowance for delinquency in the collection of taxes, was unconstitutional and void. The exigency of the case did not require the court to decide, and it did not decide whether the whole section was void on its face. But we think the logical result of the decision is, that the whole section was unconstitutional and void *per se*. The clause requiring an allowance to be made for delinquency in the collection of the tax, is so blended with the remainder of the section, and the several clauses are so dependent on each other, that they must all stand or fall together.

The rule applicable to this point is forcibly stated by Chief Justice Shaw in *Warren vs. Mayor of Charlestown*, 2 Gray, 98, who, after stating the general proposition that some portions of a statute may be held to be constitutional, while another portion may be pronounced void, and that in certain cases the valid portion may stand and the other be rejected, proceeds to say, that "this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them." This case was quoted with approval in *French vs. Treadwell*, 34 Cal., 548; and doubtless states the law correctly. Tested by this rule, the whole of section 3695 was void *per se*.

The Statute authorized the State Board of Equalization to determine the rate of taxation, coupled with the condition that it should make an allowance for delinquency in the collection of the tax. The power was to be exercised only on this condition, and the condition having failed on constitutional grounds, the power to determine the rate, fell with it. In other words, the two clauses were "dependent, conditional or connected," in the language of Chief Justice Shaw, and must stand or fall together. This becomes the more apparent from the fact that if the clause requiring an allowance for the delinquency be stricken out, the State Board of Equalization has no authority to fix any rate of taxation, except such as would produce the requisite amount of revenue, on the hypothesis that all the taxes would be paid; and as there will always be, under our revenue system, (as is demonstrated by long experience), a considerable delinquency in the collection of taxes, the necessary result would be, that the rate fixed by the Board, and the only rate which, by the terms of the Statute, they had the right to establish, would be insufficient to produce the required amount of revenue.

But we need not elaborate this point further, as it is obvious, we think, that no portion of the section can stand, if the clause relating to the allow-

ance for the deficiency, be stricken out; and the necessary result would be, that the tax collector's deed would have been void on its face.

Section 3786 of the Political Code required the Tax Collector's deed to recite, amongst other matters, that the land was sold for taxes, "giving the amount and year of the assessment." The deed therefore would have shown on its face that it was for a State tax purporting to have been levied for the fiscal year of 1872-3, whereas, as has been shown, there was no valid law authorizing a State tax to be levied or collected for that year. The deed would therefore have been void on its face—so far as it related to the State tax.

Nor would it have been otherwise, if it had appeared on the face of the deed, that the same land was sold at the same time, to the same purchaser, for a valid municipal tax. It is a familiar rule, that if land be sold for taxes a part of which are valid and a part illegal, the whole sale and the tax deed will be void.

For these reasons we are of opinion that when the plaintiff paid the money to the defendant, he was under no legal duress, and the payment must be deemed to have been voluntary. In such cases, it is well settled that the money cannot be recovered back; and the judgment in the court below should have been for the defendant.

Nor do we see any reason for remanding the cause for a new trial. It is evident the plaintiff could not improve his case on another trial.

Judgment and order reversed and cause remanded with directions to the court below to dismiss the action.

BY THE COURT.

(Filed September 3, 1878.)

MAHE }
vs. } No. 5547.
AUSTIN }

On the authority of *Wills vs. Austin*, decided at the present term, the judgment and order are reversed and cause remanded with directions to the court below to dismiss the action.

BY THE COURT.

(Filed September 3, 1878.)

MCCARTHY }
vs. } No. 5548.
AUSTIN }

On the authority of *Wills vs. Austin*, decided at the present term, the judgment and order are reversed and cause remanded with directions to the court below to dismiss the action.

BY THE COURT.

(Filed September 3, 1878.)

TECHMAKER }
vs. } No. 5550.
AUSTIN }

On the authority of *Wills vs. Austin*, decided at the present term, the judgment and order are reversed and cause remanded with directions to the court below to dismiss the action.

Unwritten Decision.

(Decided September 3, 1878.)

G. RAMBO, Plaintiff and Respondent, }
vs. } No. 5598
CITY AND COUNTY OF SAN FRANCISCO,
Defendants and Appellants. }

Appeal from the Twelfth District Court, San Francisco.

DAINGERFIELD, Judge.

CONTRACT FOR SIDEWALKS IN SAN FRANCISCO—REMEDY OF SEWERAGE.

STATEMENT OF CASE.

In this action, commenced January 4, 1877, plaintiff claims that on May 1, 1880, Third street between Market and Mission, was a public street, and ever since; and that the Board of Supervisors, on August 22, 1885, adopted a resolution that asphaltum sidewalks be constructed on the part of Third street named, and thence proceeded legally and properly with notices, publications, bids, etc., and awarded the contract to plaintiff at the price of \$3,728.50, and he completed the work on November 23, 1878, which was approved by the Commissioners, and accepted by the Board, with the exception of the sewerage of the small cross streets.

It was thereafter finally passed and published, and signed by the Mayor on January 5, 1884.

On January 3, 1877, plaintiff presented a demand for payment of the \$3,728.50 to the Board, which they rejected and refused to pay, and he demanded judgment for the amount and costs.

Defendant demurred, which was overruled on February 8th, with ten days time to answer. No answer was made, and at the expiration of the time judgment was entered, and recorded March 1, 1877.

Defendant appealed from the order and judgment, making the point that the sewerage was not accepted by the Board.

D. H. WATKINSON, attorney for plaintiff and respondent. W. C. BARNETT, attorney for defendant and appellant.

Judgment and orders now reversed and cause remanded for new trial.

(Decided September 9, 1878.)

J. HENRY WOOD, Plff. and Resp., }
vs. } No. 5549.
JNO. P. JACKSON, AND CHAR. W. }
HOWARD, Defts. and Appels. }

Appeal from the Seventh District Court, Napa County.

WM. C. WALLACE, Judge.

PROMISSORY NOTE—LEGAL TENDER—MORTGAGE FORECLOSURE.

STATEMENT OF THE CASE.

The defendant gave to plaintiff, on August 7, 1873, his note at 12 months, for \$25,000, bearing interest at one per cent. per month, payable monthly, and if not so paid, to draw the same interest; and if unpaid for 10 days, plaintiff can, at his option, declare all the principal and interest due and payable, and can enforce payment, with five per cent. counsel fees and commissions. All secured by a mortgage on the 160 acres embracing the Napa Soda Springs property, with four other tracts of land of 160 acres each, in same vicinity.

Also, on January 10, 1877, defendant executed a mortgage on the same premises to one C. W. Howard, with his promissory note for \$27,000.

Plaintiff claims as due at the commencement of this action, a balance of principal \$15,000, and interest for the two months from June 7 to August 7, 1873, on the \$25,000; \$250, with interest on it; and interest on the \$15,000 for one month from May 7 to June 7, 1877; \$150 with interest on it, and demands, judgment, and a foreclosure and sale of the mortgaged premises.

Defendant's answer claims that he has paid \$10,000 on the principal; and all interest to May 7, 1877, leaving only due \$15,000 principal, and interest 75, from May 7 to 22, 1877, when he made a tender

to plaintiff of the said amount to extinguish the note, but plaintiff refused, claiming the \$800 for the two month's interest in 1873.

The cause was tried at the October term of 1877, and the court found that only \$15,075 was due on May 23, 1877, which defendant tendered to plaintiff by check on Falkner, Bell, & Co., also offering to get gold instead if required, but plaintiff refused, only because the amount was not enough. Judgment given plaintiff for \$15,000, with interest from May 7, 1877, to entry of judgment, at one per cent. per month, computed monthly; and a decree of foreclosure of the mortgage, with \$400 counsel fees, and costs for plaintiff to the time of filing of defendant's answer, but not since. Judgment entered on November 9, 1877. Defendant appealed from the judgment on December 3, 1877, urging that his tender should have cut off all interest and the \$400 for counsel fees, and that the judgment be so modified.

Judgment now affirmed.

Betts & Sullivan, and *C. A. Tytle*, attorneys for plaintiff and respondent. *Thos. P. Stoney*, attorney for defendant and appellant.

SUPREME COURT RECORD.

[JULY TERM, 1878.]

NO MORE CASES CALLED.—On Monday, Aug. 26, it was ordered that no more cases on the regular published calendar will be called this term.

The court will hear all cases that have been called and announced "ready."

APPEALS DISMISSED.—September 2nd—No 6207—*People ex rel. Ahart vs. County Court of Placer Co.* Application for writ, denied.

September 5th—No. 6059.—*Moore vs. McAller et al.*—on motion of Burch for Appellant.

CASES CONTINUED.—September 2nd—No. 5686—*Merle vs. Thorp et al.*—for the term, by stipulation.

Sept. 3d.—No. 5811—*Gleason vs. Gleason* For the term—on motion of Adams.

REHEARING.—September 7th.—No. 6025—*Ybarra vs. Lorenzana et al.*—Stay of Proceedings,—on motion of Hartman, and Petition filed.

ADMITTED TO PRACTICE.—On August 28th—*George W. Langan*,—on motion of Outler McAllister, and license from Supreme Court of Washington Territory.

On August 29th—*Michael W. Pepper*,—on motion of L. S. Clark, and license from Supreme Court of Wisconsin.

Sept. 3d.—*Thornton Carusi*—on motion of Hon. Wm. M. Stewart, and license from Supreme Court of District of Columbia.

THE AMERICAN BAR ASSOCIATION.

The organization of "The American Bar Association" is one of the most noteworthy events in the history of jurisprudence in this country. To assimilate and unify the laws of the several States, especially so far as they relate to commerce and to crime, is a consummation devoutly to be wished by every lover of his country, for not only will it facilitate intercourse and harmony among the people, but it will also be one of the strongest bonds of Union among the several States. The meeting at Saratoga called together an unusual number of representative lawyers and jurists—men who have made their mark either in the forum or upon the bench, and the interest and enthusiasm manifested in the undertaking show unmistakably that the time is come for such an organization. To our thinking, it would have been better could such an association have been composed of delegates from bar associations of the several States—just as State bar associations would be more influential—more potent if formed of delegates from county or local associations, but with the few State bar associations which now exist, such a formation is at present impracticable, and that which has been made at Saratoga seems to be the best substitute. The proceedings of the two days through which the meeting extended are notable for the absence of "talk," to which lawyers are sometimes addicted. The business in hand was discussed by the best men present, and with an obvious desire to secure the best organization—the best results possible. This, we believe, has been done, and under the administration of the men who have it in charge, "The American Bar Association" can hardly fail to prove of great service to the profession and to the country.

ITS PROCEEDINGS.

In pursuance of a resolution adopted by the Jurisprudence Department of the American Social Science Congress at its last annual

session, an invitation was sent to many of the leading lawyers and jurists of the country to meet at Saratoga on the 21st of August, for the purpose of establishing an American Bar Association. The invitation was signed by leading lawyers of the several States, among whom were William M. Everts and John K. Porter of New York; Benjamin H. Bristow, of Kentucky; J. Randolph Tucker, of Virginia; Stanley Matthews, of Ohio; Lyman Trumbull, of Illinois, and Charles R. Train, of Massachusetts.

At 10 o'clock on Wednesday the lawyers convened in the Supreme Court room at Saratoga—over two hundred members of the bars of the several States being in attendance. The meeting was called to order by Hon. Roger Averill, of Connecticut. The Hon. F. C. Latrobe, of Baltimore, was elected temporary Chairman, and Francis Rawle, of Philadelphia, and Isaac Grant Thompson, of Albany, temporary Secretaries.

A Committee on permanent organization was then appointed, which reported the name of Benjamin H. Bristow, of Kentucky, for Chairman, and Francis Rawle and Isaac Grant Thompson for Secretaries.

A Committee of nine was appointed to report a Constitution and By-laws. This Committee consisted of Carleton Hunt, of New Orleans, Chairman; Simeon E. Baldwin, of the Yale College Law School; Prof. H. M. Hitchcock, of St. Louis; E. J. Phelps, of Vermont; Professor James S. Pirtle, of Kentucky; Rufus King, of Cincinnati; Ex-Governor William Gaston, of Massachusetts; Hon. Henry Smith, of Albany, and Hon. Henry Green, of Pennsylvania.

This Committee, after a conference of three hours, reported the following Constitution, which was, after some debate, adopted.

CONSTITUTION.

Name and Object.

ARTICLE I.—This Association shall be known as "The American Bar Association." Its object shall be to advance the science of jurisprudence, promote the administration of

justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.

Qualifications for Membership.

ART. II.—Any person shall be eligible to membership of this Association who shall be, and shall for five years next preceding have been, a member in good standing of the bar of any State, and who shall also be nominated as hereinafter provided.

Officers and Committees.

ART. III.—The following officers shall be elected at each annual meeting for the year ensuing: A President—the same person shall not be elected President two years in succession; one Vice-President from each State; a Secretary; a Treasurer; a Council consisting of one member from each State; the Council shall be a Standing Committee on nominations for office; an Executive Committee, to be composed of the Secretary and Treasurer, together with three members of the Council, to be chosen by the Association, one of whom shall be Chairman of the Committee.

The following Committees shall be annually appointed by the President for the year ensuing, and shall consist of five members each: On Jurisprudence and Law Reform; on Judicial administration and Remedial Procedure; on Legal Education and Admissions to the bar; on Commercial Law; on International Law; on Publication; on Grievances.

A majority of those members of any committee, including the Council, who may be present at any meeting of the Association, shall constitute a quorum of such committee for the purposes of such meeting.

The Vice-President for each State, and not less than two other members from such State, to be annually elected, shall constitute a Local Council for such State, to which shall be referred all applications for membership from such State. The Vice-President shall be *ex-officio* Chairman of such Council.

Election of Members.

ART. IV.—All nominations for membership shall be made by the Local Council of the State, to the bar of which the persons nominated belong. In default of such a Council in any State, nominations may be made by the General Council of the Association. All elections shall be by ballot.

Several nominees, if from the same State, may be voted for upon the same ballot; and

in such case placing the word "No" against any name or names upon the ticket shall be deemed a negative vote against such name or names, and against those only. Five negative votes shall suffice to defeat an election.

By-Laws.

ART. V.—By-laws may be adopted at any annual meeting of the Association, by a majority of the members present. It shall be the duty of the Executive Committee, without delay, to adopt suitable By-laws, which shall be in force until rescinded by the Association.

Dues.

ART. VI.—Each member shall pay five dollars to the Treasurer as annual dues, and no person shall be qualified to exercise any privilege of membership who is in default. Such dues shall be payable and the payment thereof enforced as may be provided by the By-laws. Members shall be entitled to receive all publications of the Association free of charge.

Annual Address.

ART. VII.—The President shall open each annual meeting of the Association with an address, in which he shall communicate the most noteworthy changes in statute law, on points of general interest, made in the several States and by Congress during the preceding year. It shall be the duty of the members of the General Council from each State to report to the President on or before the first day of May, annually, any such legislation in his State.

Annual Meetings.

ART. VIII.—This Association shall meet annually in the month of July or August, at such time and place as the Executive Committee may select, and those present at such meeting shall constitute a quorum.

Members.

ART. IX.—All members of the Conference adopting the Constitution, and all persons elected by them, upon the recommendation of the Committee of five appointed by such Conference, shall become members of the Association upon payment of the annual dues for the current year herein provided for.

Amendments.

ART. X.—This Constitution may be altered or amended by a vote of three-fourths of the members present at any annual meeting, but no such change shall be made at any meeting at which less than thirty members are present.

Construction.

ART. XI.—The word *State*, wherever used in this Constitution, shall be deemed to be equivalent to *State, Territory, and the District of Columbia*.

The Council on Thursday morning reported the following names as nominees for the several offices of the Association, and they were unanimously elected:

President—James O. Broadhead, St. Louis, Missouri.

Vice-Presidents—Arkansas, Geo. A. Gallagher; Connecticut, Origen S. Seymour; Delaware, Anthony Higgins; District of Columbia, H. H. Wells; Florida, Chas. W. Jones; Georgia, A. R. Lawton; Illinois, David Davis; Indiana, Thomas F. Davidson; Iowa, W. G. Hammond; Kentucky, Benjamin H. Bristow; Louisiana, Thomas J. Semmes; Maryland, Richard J. Gittings; Maine, A. A. Strout; Massachusetts, Wm. Gaston; Michigan, Thomas M. Cooley; Mississippi, Jas. T. Harrison; Missouri, Henry Hitchcock; Nebraska, George K. Armory; New Hampshire, C. W. Stanley; New Jersey, A. Q. Keasbey; New York, Clarkson N. Potter; Ohio, Rufus King; Pennsylvania, George M. Biddle; Rhode Island, C. C. Van Zant; South Carolina, H. E. Young; Tennessee, Wm. F. Cooper; Vermont, Edward J. Phelps; Virginia, J. Randolph Tucker; West Virginia, John A. Hutchinson. Secretary—Edward Otis Hinkley, Baltimore.

Treasurer—Francis Rawle, Philadelphia. A local council for each State was also reported and elected. That for New York is comprised of the following gentlemen: John Winslow, Brooklyn; William Allen Butler, New York; Matthew Hale, Albany, and William C. Ruger, Syracuse.

The following gentlemen were elected to constitute, with the Secretary and Treasurer, the Executive Committee: Simeon E. Baldwin of New Haven; William A. Fisher of Baltimore; and Hon. Luke P. Poland of Vermont.

Besides the gentlemen present, in response to the invitation, and who alone participated in the organization and were by the Constitution made members, a large number of lawyers of the several States who had, by letter or otherwise, expressed a desire to join the Association, were elected members on the nomination of the Council.

The meeting was one of unusual interest. The utmost harmony and goodwill prevailed, and there was an entire absence of that disposition to quibble and debate little points—

of empty and idle talk — that frequently make lawyers' conferences great bores. Among those who took a more active part in organizing the Association were Judge Poland, of Vermont; Ex-Gov. Gaston, of Massachusetts; Simeon E. Baldwin, of New Haven; Mr. Henry Smith, of Albany; Gen. Bullard, of Saratoga; Mr. Keasbey, of New Jersey; Mr. Hinkley, of Baltimore; Ex-Sec. Bristow, of Kentucky; Prof. Hitchcock, of St. Louis, and Mr. Carleton Hunt, of Louisiana.

President Broadhead, on taking the Chair, delivered a brief but eloquent address on the mission of such an association. — *Albany Law Journal*.

The Sonoma County Quicksilver Case.

The closing argument to the jury in the case of *Mias A. Stone vs. the Geyser Quicksilver Mining Company et al.*, action to recover some four miles of cinnabar mining property in Sonoma county, valued at more than a million and a half of dollars, the trial of which has occupied the Fourth District Court the past two weeks was concluded this afternoon, and after an elaborate charge by Judge Morrison, the jury retired. At a quarter past 4 o'clock the jury came in, and the Foreman said there was no possibility of agreeing. Judge Morrison said he could not discharge the jury after so short a consultation, and directed that they be provided accommodations for the night, with instructions to bring in a sealed verdict.

The points of the case, as shown by the evidence, are briefly these: In 1861 a mining district called the Geyser Road Mining District was established in Sonoma county, with rules and regulations, and a Recorder was duly elected. Claims composing the premises in controversy were located by certain companies in the spring of that year, and each was taken up by the members in common. At a meeting of the claimants held on the 16th of December following, it was resolved to consolidate the companies. On the 8th of January, 1861, the rules and regulations of the district were amended, validating all claims prior to that date. On the same day the Alameda, California, Boston, Buckeye, Chapparel, Potosi, Pennsylvania, Beakburg, Empire, Bowman River and Gibraltar Companies agreed to incorporate under the name of the Geyser Quicksilver Mining Company. By-laws were adopted, officers elected and a certificate of incorporation duly executed and acknowledged. This company was not the corporation defendant of that name. A committee was subsequently appointed to take possession of the claims, and they were surveyed by the County Surveyor. On the 25th of April, 1861, two men went to work for the corporation in a tunnel on the Headburg ground. On the 2d of June following, the San Francisco and Last Chance companies transferred their grounds to the corporation, and a month later the Pennsylvania Company received stock in the consolidated company and gave up possession of the Pennsylvania ground. On the 8th of July of that year the name of the corporation was

changed to the American Quicksilver Mining Company. A majority of the original locators in each of the twelve claims named, which claims are defendants in the case on trial, signed the by-laws of the Consolidated Company, and received stock in proportion to their several interests. A Superintendent was appointed, who took possession of the twelve claims and went to work for the corporation. On April 7, 1862, suit was brought in the Seventh District Court against the corporation for debt. On the 28th of that month judgment was obtained, execution levied, and on the 26th of July following, the sheriff sold the property to one Daly. Plaintiff claims that the title is vested in him by mesne conveyance, also an undivided one-fifth equitable interest in the same as early as April 11, 1864. A month previous to the Sheriff's sale, a Mexican grant, called the Castamajonic, with more or less undeterminate boundaries, which had been rejected by the Commissioners under the act March 2, 1861, was confirmed by the United States District Court. The Castamajonic grant, it was claimed, took in the premises in dispute. A survey, including a part of the premises, was made and approved by the United States Surveyor-General. The claimants under this grant prevented the other claimants from developing the mines, but Mr. Jacobs, who lived near the mines, taking charge of them. On the 6th of February, 1866, the property was conveyed to E. F. Clark, who, in the early part of that year procured a favorable report from Professor Parke as to the prospects of these mines. This report was corroborated by Sherman Day, a civil engineer, who was of the opinion that the claims contained large deposits of cinnabar. On the 11th of March, 1864, plaintiff commenced suit against the defendants. He claims that until the fall of 1871 no one intruded upon the property or made any controversy about the possession of it. The locus is visible to the naked eye. Professor Parke says the outcrops of the vein are so large and marked that they can be easily discerned at a distance of several miles. The defendants claim, under relocations made in the fall of 1871, and set up that title has been forfeited by the plaintiff and his predecessors under the mining rules and regulations. Plaintiff says that the defendants seditiously and illegally intruded on him and endeavored to improve him out of the estate by improvements deliberately made for that purpose. — *Daily Bulletin*, August 26th.

UNITED STATES DISTRICT COURT.

District of Oregon.

(TUESDAY, July 2, 1878.)

THE BLENNHEIM — Peter Iredale et al., claimants.

FREIGHT — DELIVERY OF. — A vessel while taking on a cargo of flour, by the charter, by mistake of the mate and wharfinger, took on 83 sacks more than was entered upon the bill of lading or shipped on account of the charter. Held, that it was the duty of the master upon discharging the cargo at the port of delivery, if the owner of the 83 sacks of flour was not present to receive the same, to store it safely, subject to freight and charges, and notify the owner thereof, and that having failed to do so, but delivered the same to the charterer, or his assigns, whereby the flour was lost to the

owner, the vessel is liable for the value of the same with interest.

LIMITATION IN ADMIRALTY.—A demand in Admiralty is not necessarily barred by lapse of time, but the matter rests in the discretion of the court, to be governed by the circumstances of the case, considered with reference to the wants and convenience of commerce, and the analogies of the local law of limitation.

DEADY, J.

This suit is brought by the libellant, John S. Bernard, to recover the sum of \$450, the alleged value of a quantity of flour shipped on the British barque *Blenheim*, and not delivered or accounted for. The testimony in the case is meagre, and leaves some points, made by counsel, in doubt. But the following facts are satisfactorily established. In January, 1874, and thereafter, the libellant was engaged in the business of a wharfinger and houseman at Portland, Oregon, when and where the *Blenheim* received a cargo of flour from the libellant, for and on account of the charterer of the vessel, to be shipped to Great Britain or the continent of Europe; that by mistake of the parties, including the mate who kept the tally, 83 sacks of flour, weighing 98 pounds each, were shipped on said vessel in excess of the cargo furnished to said charterer, and entered upon the bill of lading, which sacks of flour were delivered by the master to the charterer or his assigns at Havre, France, and thereby lost to the libellants; and, that the *Blenheim* did not return to this port until shortly before the commencement of this suit—March 30, 1878.

The fact that this excess of flour was taken on board and discharged at Havre is distinctly admitted by the managing owner, Mr. S. Martin, in a letter to the libellant, dated December 31, 1874.

Upon this state of facts I think the vessel is liable as for a non-delivery of the flour. When goods are taken on board by mistake—as in this case—the law will imply a contract between the master and owner, to deliver them on account of the latter at the port of destination for the remainder of the cargo—particularly where the goods so shipped are of the same kind and character as the rest of the cargo. This being so, the general rule applies. If the owner is not present at the port of delivery to receive goods, it is the duty of the master to store them in a place of safety, subject to the lien of the vessel for freight and charges, and notify the owner. (*The Eddy*, 5 Wall., 495.)

In this case the master of the *Blenheim* should have stored the flour safely at Havre, on account of the libellant, and notified him of the fact, unless, perhaps, he chose to dis-

pose of it on his account and remit the proceeds, less the freight and charges, or to return the flour to him at Portland. The flour having been lost to the libellant by this neglect of a plain duty on the part of the master, the vessel is liable to the libellant for the loss.

Objection is made that this is a stale demand, and that the proof tends to show that since the date of the transaction out of which it arises, the vessel has changed owners in whole or in part. But a sufficient answer to this objection is found in the fact that the *Blenheim* has not been in this jurisdiction since the taking away of this flour, until the commencement of this suit. There is no fixed rule of limitation in the admiralty, but the matter is left to the discretion of the court, to be governed by the facts and circumstances of the case, considered with due reference to the wants and convenience of commerce, and the analogies of the local laws of limitation. (Ben. Ad. §§ 574, 575.) This suit would not be barred by the statute of this Estate, even if the vessel had remained within its jurisdiction since the cause arose, but it might be brought within 6 years after the right accrued. (Or. Civ. Code, § 6.) Neither has there been any unnecessary delay on the part of the libellant in asserting his rights, from which it may be inferred that the demand was neglected or abandoned. The suit was brought as soon as it could be where the cause arose. The libellant was not bound to incur the expense or risk of following this vessel around the world to bring suit against her. It was sufficient to do so as soon as her return to this jurisdiction permitted it to be done.

It appears from the proof that at the time of the discharge of the cargo of the *Blenheim* at Havre, flour was worth there not less than \$8 per barrel. These 83 sacks were equivalent to 41½ barrels, and at this rate were worth \$332. Add to this amount legal interest on the same for three years and six months, which allows one year from the time of shipment for a sale and returns, and it makes \$449.40, for which sum the libellant is entitled to a decree.

David Goodsell and H. N. Northrup, for libellants.

Benton Killin for the claimants.

HASTINGS' LAW DEPARTMENT.

OF THE
UNIVERSITY OF CALIFORNIA.

OUTLINE COURSE OF STUDY.**JUNIOR YEAR.**

FIRST COURSE. I.—*The Law as to Persons.* Text-book: Kent's Commentaries, Lectures 24 to 32. Works for collateral reading will be announced to the class. II.—*The Law as to Personal Property.* Text-book: Kent's Comm., Lectures 35 to 38. III.—Outline of the *Law as to Contracts*, including the general doctrines which apply to all contracts, and the general principles of the most important mercantile contracts. Text-books: Metcalf on Contracts, Parsons do., Kent's Comm., Lectures upon the various mercantile contracts.

SECOND COURSE. *The Law as to Real Property*, including its origin and history, and all its branches except Remainders, Uses and Trusts, Powers, and certain Equitable Estates. Text-Books: Blackstone's Comm., second book; Washburne on Real Property.

The Statutory Legislation of California and other Pacific States is referred to constantly throughout the studies of the whole year.

MIDDLE YEAR.

A full course of *Mercantile and Commercial Law*, embracing Corporations, Agency, Partnership, Sale, Bailments, Bills and Notes, Insurance, Shipping Contracts, Suretyship, etc.

Certain branches of Real Property, viz.: Remainders, Uses and Trusts, and Powers.

The law as to Last Wills and Testaments, and the Administration of the Estates of Deceased Persons.

Equity Jurisprudence. Constant reference will be made to the Statutory Legislation.

SENIOR YEAR.

Pleading and Practice according to the Reformed System of Procedure, with the general theory of common law forms of action, and of Common Law and Equity Pleading, Evidence, Constitutional Law, Criminal Law, Admiralty Law, Patent Law.

Lectures upon Medical Jurisprudence. The Principles of Morality in their effect upon the law and in their application to its practice, Public International Law, Private International Law or the Conflict of Laws, the Roman Law, General and Comparative Jurisprudence.

MOOT COURTS, ETC.

A Moot Court will be established for the argument of causes and the discussion of legal questions by members of all the classes. It is hoped that the students will also form debating societies or clubs.

The Senior Class will have constant exercises in the preparation of Pleadings, and other legal papers and written instruments of all kinds.

JOHN NORTON POMEROY, LL. D.

PROFESSOR OF MUNICIPAL LAW.

The CALIFORNIA LEGAL RECORD is a full and complete continuance—and the only one—of the publication of the *California Supreme Court decisions* from the close of the "San Francisco Law Journal," vol. 1., and will contain every decision rendered since the close of that volume, on February 23, 1878,—as rapidly and soon as time and space will permit.

There have also been added twelve decisions omitted from that work through the neglect of its former editor. We have nothing further to do with the "Pacific Coast Law Journal," nor has it any connection with us or this office.

F. A. SCOFFIELD & Co.,
Publishers and proprietors LEGAL RECORD.

CALIFORNIA LEGAL RECORD.

Vol. I.

SATURDAY, SEPTEMBER 14, 1878.

No. 94.

Legal Notes.

"SUPREME COURT RECORD."

Under this new head we shall henceforth note each week (commencing last week) every *Appeal Dismissed*; or *continued for the term*; *Rehearing*;—and "Admitted to Practice;" which, with our report of every *Decision and Opinion rendered*, will give the *final disposition of every case* on the calendar for the term.

CHURCH PROPERTY—A subscriber is informed that church property must be taxed under the Constitution of California in common with all other property. There is no published statement of the value of church property in California. It would be well, however, if the Assessors would report the assessed value of such property for publication.

RAILWAY COMPANYS' LAND.

That a railway company cannot use its land for purposes foreign to its business has just been decided in England by Vice-Chancellor Malins in the case of Norton vs. The North Western Railroad Company. Plaintiff owned a hotel which abutted upon the lands of the railway company. On that side of the hotel there were several windows. These were used without interruption for some years, until 1874, when the company put up, on its land, a signal cabin with a small chimney, exactly under the windows mentioned. The plaintiff complained of the smoke from the chimney, which came through the windows into his hotel, as a nuisance. The Company thereupon demanded a quit rent from plaintiff, in consideration of his outlook across the railway. This being refused, the Company began the erection of a

high and close board fence upon its own land, and about two feet from the windows of plaintiff's hotel, and almost completely excluding the light and air therefrom. The action was brought to enjoin the erection and continuance of the fence. The Company claimed that what it had done was for the purpose of preventing plaintiff from acquiring, by user, an easement in light and air which would prevent the erection of buildings which the Company might in the future require for its business. The injunction was granted, the Vice-Chancellor stating that the Railway Company had not all the rights of an owner in fee simple, and that the owner of land adjoining that of a railway had the same rights as if the railway had not been constructed. Among those rights was that of building a house with windows overlooking the land belonging to the Company, provided he did not erect such buildings as would interfere with the working of the line. Besides, a railway company is bound by statute not to do any avoidable injury to the public or to adjoining land-owners. The decision is an important one and covers a question as liable to arise here as in England.—*Albany Law Journal*.

"BOYS' AND GIRLS' AID SOCIETY"—We take pleasure in calling the attention of the Profession and the Public to this truly worthy beneficent Society, for befriending the helpless and neglected children of the City.

Its rooms, at No. 68 Clementina St, and 116 Jackson St, are open every afternoon and evening, except Sundays. Over 900 children are now members:—158 have been placed in homes in the Country, or found employment in the City—24,000 baths have been given; 2 Sewing Schools and an Evening

School maintained; the library, of 2,200 volumes been in constant use;—and the children have put \$545. in the Savings Bank. 700 have joined the temperance band. The whole is entirely unsectarian, and private subscriptions are its only reliance.

But the treasury of the Society is now entirely empty, and unless aid soon comes the work must stop.—\$4000. will sustain it for a year;—and any friends of the little ones,—from City or Country,—can send subscriptions to any of the undersigned.

Geo. C. Hickox, Presr.—228. Montgomery St.
 Geo. M. Johnson, Sec.—116. Jackson St.
 D. C. Bates, Treasr.—318. California St.
 S. B. Boswell, Trustee—318 California St.
 Geo. E. Butler, “ 316 California St.
 A. McF. Davis, “ 41 First St.
 David Meeker, “ 117 Market St.
 John Mullan, “ 624 Commercial St.
 Chas. A. Murdock, “ 532 Clay St.
 J. W. Taylor, “ 501 Market St.
 Jas. Woodworth, “ Room 114 Montg. Bl'k.
 or, in care of the RECORD OFFICE.

A NEW SERIES OF LAW REPORTS.!!!

Somebody in Pennsylvania, dissatisfied with the way the judges of that State arrive at their conclusions, announces the publication of a new series of reports, and presents some specimens of the fictitious cases to the profession, two of which the “*American Law Review*,” in its last issue, reprints. One of these, *Silas Tompkins vs. Commonwealth*, is very amusing. The syllabus reads as follows: “1. A defendant may be convicted for poisoning on an indictment which charges a murder by a clasp knife. 2. It is no objection to a conviction that it nowhere appears in the record that the Judge before whom the case was tried was duly commissioned by the Governor. 3. It is not error to ask a prisoner, when called up for sentence, ‘what he has to say why judgment should not be pronounced,’ etc., instead of ‘whether he has anything to say,’ etc. 4.

The course of the administration of criminal practice cannot be stopped for 6 cents.”

The opinion of the court is after this style: “The defendant below was found guilty of the gratuitous murder of a mother and her ten children, under circumstances of useless and offensive barbarity. We were quite prepared to hear his counsel arguing that the conviction was erroneous, and their client innocent. It is always so in aggravated cases. But with the innocence of Tompkins, we, as a court of error, have really nothing to do. Law is the hypotenuse of a right-angle triangle, of which logic and moral philosophy are the other two sides. Though it touches them each at one point, its general direction is quite distinct. Mistakes will happen, of course, in our judicial system, as accidents do on our railways; but we can do without neither the one nor the other. Each usually carries its passengers in safety; and when the wrong man is now and then hung or blown up, he must console himself with the reflection that he is a sacrifice to the necessities of society.

With the law of this case alone it is our province to deal. We find here the usual parade of exceptions, and points and assignments of error, and a paper book encrusted with authorities like barnacles. Everything that the ingenuity of counsel could suggest has been done to confuse and complicate the design of the case, in the hope, perhaps, that the prisoner, concealed by the dust of argumentation, might escape in a sort of legal disguise. But the eyes of justice are too quick for that sort of thing, and we, as her ministers, will block any such game without remorse. * * * In the case of *Sargent vs. Coffin*, 12 Mass. 315, it was properly decided that an erection on a navigable river was a nuisance; and in *Smith vs. Mildmay's Administrator*, 31 Ala. 410, it was held that notice to the indorser of a note of its dishonor might be waived. I need not refer to the rule in *Shelly's case*, 1 Rep. 88, nor to the well-known *Woodworth Patent case* of

Wilson vs. Barnum, 8 How. (U. S.) 253. These, and other decisions which it would be mere pedantry to cite, show that the plaintiff in error has no cause to complain of the charge of the court.

The other errors are merely supernumeraries, joined to the principal characters in order to give them an air of fictitious importance on the stage. We shall do the prisoner no wrong by disregarding them. A criminal, at his trial, plays at pitch-and-toss with the law for his life, and, if he loses, he must pay the stakes. It is too late to contest here the minor points of the game, which ought to have been settled as it went on.

Judgment affirmed.

Central Law Journal.

ACKNOWLEDGMENT BY MARRIED WOMEN.

Perhaps there is no one subject upon which the courts have differed so much; and particularly in reference to the effect of a married woman's acknowledgment. It is pretty generally agreed, that where a statute makes an acknowledgment on private examination a condition of her power to convey; without such acknowledgment, or at least a certificate of such acknowledgment, the deed of a married woman is void. The Supreme Court of the United States, as also that of Massachusetts, have held that if a deed, at the time of its acknowledgment, lacks any essential part of an effective grant, however regular and regularly certified in every other particular, it is ineffectual, and cannot be made effectual by a subsequent filling up or an amendment, though by express authority of the married woman, without a reacknowledgment.

Some of the western courts have held, that on grounds of public policy, affecting the security of titles, the certificate of the magistrate is conclusive upon the grantor, and cannot be impeached by the grantor's testimony that the acknowledgment and execution were not free. The theory of the

rule is, that the freedom of a deed is a question which it is the duty of the magistrate to investigate and determine; and that his certificate as to the freedom of the execution must be conclusive. The freedom of the acknowledgment, however, may be impeached by evidence implicating the magistrate or the grantee either in fraud or misconduct; and if the certificate be thus impeached, its conclusive evidence would be gone, and, consequently, the execution of the deed itself might be impeached.

But the act of a magistrate in certifying to an acknowledgment is not a judicial determination. He only certifies to the execution of a deed, and not as to the freedom; and he is not vested with the powers of a court to determine that question. He merely certifies to an admission by the parties that the execution is free; and the only conclusive effect which his certificate can possibly have, is that which might come from regarding it as conclusive that the woman appeared before him, that she was examined apart from her husband, and that she made the admission certified to.

In the State of New York, and perhaps in other States, the statutes declare that the acknowledgment is not conclusive evidence, and there seems to be no reason why it may not be impeached by the grantor as well as by any other person.

In the case of *Merritt vs. Yates*, 22 Am. R., 128, the court held that, as in the absence of the names of the parties, it did not expressly appear that it was made by the grantor, the acknowledgment was insufficient and the deed void. And, in *Darlington vs. Darlington*, the Supreme Court of Pennsylvania held, that a certificate by a magistrate of a married woman's acknowledgment of a conveyance of her separate estate is of no effect, when the conveyance is attacked by her heirs, upon the ground of fraud and undue influence practiced upon her by her husband. — *Washington Law Reporter*.

THE DEAD ALIVE.

An Illustration of the Adage that "Fact is Stranger than Fiction."

The *Harvard Courant* published a short while ago a remarkable story relating to an application for the payment of an insurance policy, by the wife of the insurer, who was represented by her to be dead, but whom the life insurance believed to be still living. The statement of the *Courant* was to the effect that in May, 1869, William Wackerle, then a resident of Detroit, took out a policy in the *Aetna* Insurance Company, for \$3,000 payable to his wife, Walburga Wackerle, in the event of his death. Wackerle and his wife lived a cat-and-dog sort of life, and he left her soon after the policy was taken out, emigrating to this State. She, however, followed, and he was persuaded in some way to return. The couple took up their abode in Quincy, Ill., in 1870. They remained there but a short time, Wackerle again abandoning her and going south. Mrs. Wackerle believed her husband had gone to Texas, and she hastened thither in search of him, and learned what she professed to believe the news of his death on the Texas Pacific railroad, by being run over by a train. Affidavits to this effect were secured by her, and she applied for the payment of the policy on her husband's life. The agents of the *Aetna* Company, on investigation, discovered that the persons who had made affidavits to the death of Wackerle were ignorant freedmen, and did not know to what they were swearing. They also obtained counter-affidavits from some of the officers of the road, including the foreman of the gang in which the man killed was employed, to the effect that his name was Frank Ettine. The Insurance Company consequently refused to pay the policy. Mrs. Wackerle consequently commenced suit in Louisiana, against the Company, and the jury gave her a verdict. The case was carried to the Supreme Court, where the case is now pending a hearing.

Reports of the trial came to the hearing of Joseph Weinmann, of Faribault, Minn., who was intimately acquainted with Wackerle, and was First Lieutenant, during the war, of the Company in which Wackerle had served. He at once informed the Insurance Company that Wackerle was living, and in California. Subsequently, an agent of the Company calling on Weinmann, a letter from Wackerle, dated January, 1878, was shown to him, in which he (Wackerle) stated he had abandoned his wife at Quincy, Ill., because he was afraid she would kill him for the policy on his life.

Now comes the sequel to this strange case. Yesterday Wm. Wackerle, the man claimed by his wife to be dead, called at the *Bulletin* office, and demonstrated that he was a very substantial kind of a ghost. He is well known to many responsible citizens here, who vouch for his identity. Wackerle says he did fly to the South for safety, fearing his wife would kill him for the sake of recovering his life insurance. He worked for about four months as cook at Buena Vista, on the Mississippi, earning, during that period, enough money to pay his way to this State. For the past five years he has been living in Humboldt County, where he is engaged in raising farm produce. This morning Wackerle left for the East, where he goes at the expense and in the interest of the *Aetna* Company, to satisfy the Court of last resort in Louisiana of the fact that he still liveth, and that the allegations of his wife are false, and the affidavits in her possession worthless. John Hein and Nicholas Hein, two brothers who served in the same company with Wackerle during the war, are now living in Napa. A photograph was taken in this city some time ago, in which Lieutenant Weinmann (mentioned in the statement of the *Howard Courant*) William Wackerle, John Hein and Nicholas Hein form a group. Here is another illustration that "Fact is often stranger than fiction."

SUPREME COURT OF CALIFORNIA.

JULY TERM, 1878.

(Filed September 9, 1878.)

ERNEST CHURCHILL, Plaintiff and Respondent,

vs.

ALEX. F. ANDERSON, ANDREW ANDERSON, JAMES ANDERSON, ET AL., Defendants and Appellant.

No. 5984.

Appeal from Twentieth District Court, Santa Clara County.

D. BULDER, Judge.

REVERENT—LIEU LANDS—TITLE.—The title of the State to lands selected in lieu of 18th and 36th sections, can date only from their being listed over by the United States to this State.

STATEMENT OF FACTS.

The plaintiff brought action in ejectment against the defendants, on December 18th, 1868, for recovery of 320 acres of lieu lands, in Monterey (now San Benito county, claiming restitution and damages, \$2,500. Cause tried June 30, 1877, and the findings were that the said lands had been selected in lieu of a 18th section, had been duly surveyed, and plat filed in Surveyor-General's office, and the application of one Clark duly made and approved, and he had made the required payment of 20 per cent., and received a certificate of purchase, which he had sold to plaintiff, who paid up in full on October 4, 1868, and afterward received a patent therefor. But the lands were not listed to the State till March 7, 1870, by the Land Commissioner.

Prior to May, 1868, one H. M. Hulett took possession of the said land, and occupied and erected a small house, and on May 2d sold his claim to defendant, Alex. F. Anderson, who has retained possession ever since.

Judgment rendered for plaintiff on January 23, 1878, for restitution and \$1,800 damages, from April, 1872. The defendant, A. F. Anderson, had filed a demurrer and cross complaint which had been overruled and dismissed, and he now appeals from the judgment and the order.

C. C. Stephens and Spencer & Rankin attorneys for plaintiff and respondent. Moore, Laine, & Leib, attorneys for defendant and appellant.

BY THE COURT.

It appears from the findings, that when this action was commenced, the land in controversy (lieu land,) had not been listed over by the United States to this State, and it has been frequently decided by this court, that the State acquires no title which it can convey to a purchaser, until the land has been listed over. It follows that when the action was commenced, the plaintiff had no title.

Judgment reversed and cause remanded for a new trial.

(Filed September 9, 1878.)

SANTIAGO DE LA GUERRA, Plaintiff and Respondent,

vs.

H. M. NEWHALL, AND J. M. DUBORO, Defendants and Appellants.

No. 5987.

Appeal from First District Court, Ventura County E. FAWCETT, Judge.

TRESPASS—ACT OF FEBRUARY 4, 1874—SPECIAL VERDICT.—This action being brought for damages for trespass, and the jury finding, by special verdict, that plaintiff had, during the time of the trespass, availed himself of the "act to protect agriculture," etc.—of February 4, 1874—and since only one trespass (continuous) is alleged,—Held, that such trespass cannot be divided up into several separate causes of action; nor can a part of the damages for such trespass be recovered under the act, and another part by an action at Law.

STATEMENT OF FACTS.

Plaintiff brings action on July 5, 1877, for trespass of large bands of cattle of defendant (for two months, from May 5, 1877,) upon certain lands of which he (plaintiff) claims possession and occupancy; and claims damages, \$10,000. The plaintiff filed an amended complaint on November 5, 1877, and the action was tried by jury on December 4, 1877, and a verdict found of \$2,250 damages for plaintiff; and also a special verdict that plaintiff had during the two months of the alleged trespass, corralled certain cattle of defendant, under the act of February 4, 1874, and received damages, upon their release.

Defendants moved a non-suit, but were overruled also for a new trial—on a statement of the case—which was denied, and they took an appeal January 27, 1878, from the judgment and order—pleading limitation under the act,—more than 60 days having expired before the amended complaint was filed.

Hines & Brooks, and W. T. Williams, attorneys for plaintiffs and respondents. Chas. Fernald, attorney for defendant and appellant. S. M. Wilson, of counsel.

BY THE COURT.

The eighth section of the act of February 4, 1874, to protect agriculture and to prevent the trespassing of animals upon private property in certain counties (stats. 1873-4, p. 50) provides that "the owner or occupant of any land or possessory claim, whether inclosed or not, independent of the foregoing provisions of this Act, and if he fail to avail himself thereof, may maintain an action, provided such action be commenced within sixty days," etc. The defendants allege that the plaintiff did avail himself of the provisions of said Act, respecting the alleged trespasses mentioned in the complaint, and took up large numbers of the cattle of the defendants, etc. The following special issues were submitted to the jury: "Did plaintiff avail himself of the provisions of an Act of the Legislature of this State, entitled an Act to protect

agriculture, etc., passed February 4, 1874, at any time between the dates mentioned in the complaint, fifth day of May, and fifth day of July, 1877, with respect to the cattle of defendants; and did plaintiff take up and corral any of defendants cattle on the lands described in complaint under provisions of said Act, between said dates," and the jury returned thereupon the following verdict—"Answer—Yes." They also returned a general verdict for the plaintiff, and assessed his damages at \$2,260.

The complaint alleges only one trespass, and there is nothing in the special verdict, short in the record, from which it can be ascertained that the trespass, for which the cattle were taken up by the plaintiff (and it is not found how many were so taken up) was a distinct trespass; but from the record it is to be presumed that each trespass was a part of the one continuous trespass mentioned in the complaint. The party injured by such trespass is not authorized to divide it up into several causes of action, either with respect to the means by which the trespass was committed, or the time of its commission, so as to maintain separate actions or proceedings for such cause of action. No authorities need be cited in support of this proposition. Nor does the eighth section, or any other provision of the Act under consideration, contemplate a recovery of a part of the damages for the trespass, by proceeding under the Act, and another part of the damages for a portion of the same trespass, by means of an action at law.

Judgment and order reversed and cause remanded for a new trial.

(Filed September 13, 1878.)

TALCOTT, ET AL.,
vs.
BOARD OF STATE HARBOR COMMISSIONERS. } No. 5194.
RE-ARGUMENT—FOUR QUESTIONS RAISED

BY THE COURT.

Reargument ordered at present term:

First—In the absence of any statement in the facts agreed on, that the defendants have refused to pay on demand, are plaintiffs entitled to any judgment?

Second—Does the record of the proceedings of defendants show that they have "adjusted and audited" the claim?

Third—If it appears that the claim was adjusted and audited, is it not to be paid out of the State Treasury?

Fourth—If payable out of the State Treasury, is the order for payment already made the only order to which plaintiffs are entitled?

(Filed September 12, 1878.)

NOE
vs.
SUTCLIFF. } No. 5679.

RE-ARGUMENT—DECREE OF DISTRIBUTION?
BY THE COURT.

Ordered that there be a re-argument of this cause and the attention of counsel is especially directed to the question, 1st, whether the decree of distribution entered in the Probate Court, does or not estop the plaintiff from asserting title to the premises in controversy, and 2d, whether it was competent for the defendants under the averments and denials of the answer, exclusive of the third defense set up therein, to prove the facts which the defendants offered to prove, and which were excluded by the court.

Unwritten Decision.

(Decided September 3, 1878.)

ALBERT COMFEE, Plaintiff and Respondent, }
vs. } No. 5629.
WM. ROWE, Defendant and Appellant.

Appeal from Twelfth District Court, San Mateo County.

DANFORTHFIELD, Judge.

REPLEVIN—AGREEMENT FOR REPLEVIN AND PURCHASE
STATEMENT OF THE CASE.

Plaintiff claims that on May 15, 1876, he was owner of a mule worth \$300, and two dump carts worth \$164, and being then indebted to one T. J. Blackwell for \$344, agreed with him in writing that he, Blackwell, might have a lien upon the mule and carts as security for \$344—Blackwell to advance to plaintiff the other \$30—plaintiff to hold and use the property until January 1, 1876. Plaintiff paid on account, certain sums of money, and personal property, amounting, upon settlement in November, to \$246, for which Blackwell gave him receipt.

Soon after this, plaintiff sent an attorney to Blackwell to pay the balance and make a final settlement, which Blackwell refused.

Blackwell transferred the unwritten instrument to defendant, Rowe, before January 1, 1876, at which time defendant took possession of the mule and carts, knowing all the facts, and now holds them. Plaintiff has tendered \$30 balance to defendant, and demanded the property, but defendant refuses, and plaintiff now demands judgment that he may redeem them for the \$30.

Cause tried on September 4, 1876, at which defendant claims that plaintiff only hired the mule and carts,—with a privilege of purchase,—and that plaintiff paid \$290.00 as rent at \$1 per day, as per the written agreement, and that he, defendant, could only recover possession of them by suit in a Justice's Court on January 3, 1876, which case was appealed to the County Court, and appeal

there dismissed. Judgment rendered that the written agreement was not a mortgage as to the carts, but was as to the mule, to the extent of \$100, and that plaintiff has overpaid rent, \$22, and that he recover from defendant the \$122, with interest from January 1, 1876, inasmuch as defendant has already disposed of the mule and carts, so they cannot be recovered. Defendant appeals from the judgment, and the order overruling demurrer.

(The evidence showed that Blackwell bought the carts, and paid for them, and Comper was owing Blackwell \$80, and Blackwell let him have \$20 more, making \$100. Comper then bought the mule, and delivered to Blackwell as security for the \$100, and for the two carts which he desired to buy, and so gave his written agreement to Blackwell, hiring both the mule and carts at \$1 per day, till January 1, 1876, with a privilege of purchase on or before that time, by paying \$244, besides rent, which he did not do. Hence, he did not own the carts, but ~~did~~ the mule, upon paying the \$100 lien on it;—or, the balance of the value of it less the \$100, i. e. \$100.)

Harvey Kincaid, attorney for plaintiff and respondent. *A. Teague*, and *H. N. Nutting*, for defendant and appellant.

Argued by *Head* for appellant, submitted by respondent upon points and authorities on file, and appeal from the order dismissed. Judgment reversed and cause remanded.

Unwritten Decisions.
(Decided September 3, 1878.)

FREDERICK CLAY, Plff. and Resp't.,
vs.
FREDERICK MARRIOTT, Deft. & Appel. } No. 5524.
Appeal from Nineteenth District Court, San Francisco.
WHEELER, Judge.

DEFAMATORY PUBLICATION—INJUNCTION.
STATEMENT OF THE CASE.

Plaintiff complains and shows, that he has resided in California for 22 years, and had maintained a good character and credit, and was manager of the "California Cracker Company" till November 1, 1873, since which he is the President and manager of the "San Francisco Cracker Company," and has had a controversy with Adolph Weake, President and a large stockholder in the "California Cracker Company," and has suits pending between them as competitors, and that said Weake has tried to destroy the reputation and character of plaintiff, and to do so did, by the payment of money to the defendant, the publisher of the *San Francisco News Letter*, procure the publication in that paper, on May 13, 1876, of a false and defamatory article, headed "Clay's Bank, and what we know of it,"

charging plaintiff with absconding from the Bank of Australia, with various dishonest and criminal acts.

And in the same paper of September 16, 1876, another article headed "Clay's demands upon Justice," and a recommendation to the District Attorney to have plaintiff indicted.

And on September 9th and 16th, a letter headed "A Botched Bill," signed "John McMullin, Inspector and Manager," charging that a reward of 100 pounds had been offered by the Union Bank of Australia, for plaintiff, and a policeman sent for his capture. Defendant has also threatened to keep publishing on September 23d, etc., similar matter, unless restrained by the court; and having a large circulation, especially in the city, will do much damage to plaintiff unless so restrained. Hence asks an injunction, claiming that defendant is insolvent, and cannot be made to pay damages; and that it be made perpetual.

The court granted an order on Defendant, to show cause, on September 29th, to which he demurred, denying the jurisdiction of the court to enjoin and restrain.

This demurrer was overruled, and the injunction granted, from which the defendant appealed, on the ground that the court could not enjoin, but the only remedy was for defendant to take the consequences of any libel published.

H. E. Highton, attorney for plaintiff and Respondent. *Douthett & McGraw*, for defendant and appellant.

Argued by McGraw for appellant, no appearance for respondent, and order reversed.

Unwritten Decisions.
(Decided September 9, 1878.)

PAUL ROUSSET, Plaintiff and Appellant,
vs.
ALEXANDER AUSTIN, Tax Collector, and
DANIEL ROGERS, Defts. and Respts. } No. 5520.
Appeal from Twelfth District Court, San Francisco
DAINGERFIELD, Judge.

OUTSIDE PUEBLO LANDS—COMPENSATION FOR PUEBLO USES UNDER ORDER NO. 500 OF BOARD OF SUPERVISORS.

STATEMENT OF CASE.

This action was brought to recover the sum of \$810, paid to defendant Rogers by Austin, as collector, as compensation for land taken for public purposes, and to which plaintiff claimed the title. An amended complaint was filed April 30, 1876, to which defendant Rogers demurred on May 17th, as to a misjoinder of parties and liability, which was sustained, on July 16th. Defendant Austin filed answer, and the cause was tried August 1, 1877. Jury waived, and the court found that the land in question was reserved as part of a public park under Order No. 800 of the Board of Supervisors, and ratified by act of Legislature of March 27

1888; was shown on the "Outside land" map, and assessed to defendant Rogers; was in his possession long prior to, and on and after March 8, 1888, and he was the beneficiary under the laws regarding the outside lands under Order 800.

That he conveyed said land on May 22, 1888, to Daniel Green, and he conveyed it on August 6, 1888, to plaintiff Roussel.

That the Committee of the Board appointed for outside lands under the Order appraised the land at \$810 as compensation.

That prior to January, 1870, Austin, Tax Collector, collected the assessments on said outside lands, and on January 18th, paid \$728 00, the proper sum, to Rogers, as the beneficial owner of the land in question.

That he, (Rogers) did not give Austin a deed for the land, as was required by the Order.

Judgment was rendered for defendants on August 1, 1877,—from which plaintiff appealed on October 18th, and from the order sustaining demurrer of defendant Rogers.

J. E. Smyth, attorney for plaintiff and appellant. W. C. Burnett, for Alexander Austin, and Daniel Rogers, *in pro. per.* for respondents.

Appeal from order sustaining demurrer dismissed, and judgment affirmed. (Justice McKinstry did not express an opinion.)

Unwritten Decision.

(Decided September 9, 1878.)

ROBERT JUDSON, Plff. and App't.,
vs.
LEOPOLD SELIGMAN, et al., Deft's. } No. 5648.
and Resp'ts.

Appeal from Fifteenth District Court, San Francisco.

DWINELLE, Judge.

EMBROUET—NONSENSE.—Concerning lands outside the charter line of 1849, San Francisco.

STATEMENT OF CASE.

Action brought August 24, 1889, (on supplemental complaint) to recover certain lands embraced under "Order No. 800," and in the "Western Addition," in San Francisco, (and not included in the Van Ness Ordinance.) Plaintiff claimed ownership from July 10, 1867, and, upon trial—in which a jury was waived—the counsel for plaintiff made an opening statement, that he expected to prove that defendants Seligman or Cohen had obtained possession of said land from one Willey and Mulloy, tenants of plaintiff; and, while the suit was pending, had applied to the Supervisors under the acts of the Legislature and Congress, and ordinances of the city, and obtained a grant from the city. Plaintiff had filed a supplemental complaint setting up this fact. Defendants had filed a supplemental answer claiming a newly acquired

title, and plaintiff in turn had filed a supplemental complaint in nature of a Bill in Equity, charging them as trustees of the title, as having obtained the title by false allegation.

Plaintiff had not set forth his compliance, or offer to comply, with Ordinance No. 800, but had alleged possession, actual and *bona fide*, and having a tenant there from whom Seligman had obtained possession, and, in collusion with him, had obtained the grant from the city.

The court then said:—"And you say the defendant, Seligman, had complied with the terms of Order 800—I will grant a nonsuit," which the court on its own motion, did.

A motion for a new trial, on a Bill of Exceptions, was denied, and plaintiff appealed from the order, April 6, 1877.

B. S. Brooks, and W. H. Patterson, attorneys for plaintiff and appellant. G. F. & W. H. Sharp, attorneys for defendants and respondents.

Order affirmed.

Unwritten Decision.

(Decided September 9, 1878.)

THE PEOPLE, Plffs. and Resp's.,
vs.
H. T. JONES, Deft. and App't. } No. 10,304.
Appeal from County Court, Butte County.
W. S. BARFORD, County Judge.

ARSON—IMPROPER TESTIMONY—INSTRUCTION REFUSED—HEARSAY.

STATEMENT OF THE CASE.

The defendant was indicted, together with one E. C. Wright, on April 3, 1877, by the Grand Jury of Butte county, for the crime of Arson, in the burning of a building belonging to one John Bidwell, standing on the Humboldt road, near the town of Chico.

Upon arraignment of defendant, on April 10th, his attorney moved to quash the indictment, on the ground that it was procured by improper and illegal testimony, (hearsay evidence) in the written deposition of one E. E. Roberts, who was confined in jail, within reach of the Inquest. The motion was overruled, and defendant plead "not guilty." The trial, by jury, was commenced on April 18th, and, among other testimony, plaintiff offered in evidence a written statement and confession of defendant, which was objected to by defendant's counsel, as having been obtained by undue and improper influence, but was overruled.

Verdict on April 20th, of Arson in the first degree. A motion to set aside the verdict, and for a new trial were both denied, and a sentence of 20 years in the State Prison pronounced.

Appeal taken on June 13, 1877, from the judgment and the orders denying motion to quash the indictment, and for a new trial.

At a former term of the Supreme Court, the

judgment and orders were affirmed; and a petition for rehearing was filed January 21, 1878, on the one point of the refusal of the County Court to give the 11th instruction, to the effect that he could not, under the indictment, be found guilty of a higher crime than arson in the 3d degree, as it does not allege that there was any human being in the building at its burning.

Leon D. Freer, District Attorney, for the People.
P. O. Hensley, and *S. L. Terry*, attorneys for defendant and appellant.
Judgment and order affirmed. Remittitur forthwith.

Unwritten Decision.

(Decided September 10, 1878.)

G. H. PARKER, Plaintiff and Respondent,
vs.
LUDWIG ALTSCHUL, ET AL., Defendant and Appellant. } No. 5884
Appeal from Fourth District Court, San Francisco.
MORRISON, Judge.

STREET ASSESSMENT.

STATEMENT OF CASE.

This action was brought to recover \$678 33, being the amount of a street assessment on defendant's lot of land in San Francisco. The assessment was made January 15, 1874 by S. H. Kent, Superintendent of Public Streets, to meet the expense of work performed by Edward Deady, under contract for grading Webster street, from Haight to Page streets.

On December 2, 1873 Deady assigned his interest in said contract to one Thomas Byrne, and Byrne afterwards assigned the same to G. H. Parker, plaintiff herein. The cause was tried November 2, 1874 by the court without a jury. Plaintiff offered in evidence the assessment warrant and other papers usual in such cases, but defendants alleged the assessment not equal and uniform and not made *per front feet*, but *per cubic yard*; which is unauthorized by law, and therefore void. (*People vs. Lynch*, 50 Cal.; *Brady vs. King*, January term 1873.)

The assessment being void, could not be rectified by appeal to the Board of Supervisors. This, plaintiff denied, citing *Beaudry vs. Valdes*, 32 Cal. 379, and that the owner is bound to appeal if he seeks remedy. (*Dorland vs. McGlynn*, 47 Cal., 51; *Chambers vs. Sutterlee*, 49 Cal., 320.)

Judgment for plaintiff. Defendant moved for new trial October 28, 1876, which was denied, and defendant appealed from both judgment and order.

G. H. Parker, in pro. per. for plaintiff. *H. A. Lowmeyer*, attorney for defendants.
Order affirmed.

Unwritten Decision.

(Decided September 11, 1878.)

JOHN BOURK, Plff. and Resp.,
vs.
THOMAS REID, Deft. and Appt. } No. 5885.
Appeal from Fourth District Court, San Francisco.
MORRISON, Judge.

ASSAULT, AND SOBERLY INJURY—DAMAGES.

STATEMENT OF CASE.

Plaintiff brings action, against defendant, for a violent assault committed upon him on March 19, 1875, in which he threw him down and broke his leg, causing a loss of time and wages of \$750, and expense for medical attendance of \$250, and damages otherwise \$9,000; and asks judgment for \$10,000. Defendant made a general and specific denial, and the cause was tried August 31, 1876, without a jury, and decision rendered by the court, that defendant Bourk pay to plaintiff Reid \$1,000 and costs amounting to \$98 50.

Defendant moved for a new trial, on the ground—among others—of error in admitting plaintiff's evidence, (against defendant's objection) as to how much plaintiff earned by his labor before and since the injury complained of.

(Damages for injury to person not dependent on the wealth or poverty of the plaintiff—*Shea vs. P. & B. V. R. R. Co.*, 44 Cal., 414.)

Also that the deposition of one Conway was admitted in evidence, against objection of defendant, that no copy of order by the court shortening the time was served on him. (O. P. Section 1,031.)

To the first, plaintiff replied that his evidence was simply to show loss of time, and its *value*, and not his poverty or wealth; to the second, that a copy of the order, without the Judge's signature, had been served on defendant's counsel, and admission of service indorsed on the original, after which, defendant had, personally and by counsel, appeared and cross-examined Conway at the County Hospital.

New trial denied, and defendant appealed from the judgment and order.

George D. Shadburne, attorney for plaintiff and respondent. *S. F. and L. Reynolds*, for defendant and appellant.

Judgment and order affirmed.

SUPREME COURT RECORD.

[JULY TERM, 1878.]

APPEALS DISMISSED—No. 6234—*Bardin vs. Potter*—on Sept. 11th.

JUDGMENT FOR COSTS—No. 4091—*McGarrahan vs. New Idria Mining Co.* On Sept. 12th, *S. M. Wilson* Attorney for the Respondent,

filed the mandate of the U. S. Supreme Court, that the judgment of *this court* be affirmed with costs \$50.26, and execution issue therefor, and it is now ordered that Appellee receive same from Appellant, and that a remittitur forthwith issue to the 20th Judicial District Court for Santa Clara Co.

CASES CONTINUED—*Tobleman vs. Reay et al*, continued to enable appellant to supply the lost bill of exceptions in the case.

ADMITTED TO PRACTICE—Sept. 10th—Wm. F. Booth,—on license from the Supreme Court of Connecticut.

Sept. 11th—Geo. H. Vaughan,—on motion of J. H. Shankland, and evidence of admission to all the Courts of Tennessee.

Sept. 12th—Wm. W. Wheeler,—on motion of G. A. Nourse, and license from Circuit Court of Missouri.

THE SUPREME COURT-ROOM IN LOS ANGELES.—D. B. Woolf has returned from a visit to Los Angeles, and he reports the building constructed by L. W. Helman, at the corner of Main and Commercial streets, for the Supreme Court, completed and ready for occupation. He says the Court-room and Judges' and Officers' rooms the finest used for that purpose in the state. The furniture will soon be placed in the rooms in readiness for the opening of the Court on the 14th of October. *Daily Bulletin*.

Book Notice, and Review.

"LAW OF MECHANICS' LIENS" OF CALIFORNIA—with explanatory remarks. For mechanics, and material men. This accurate, complete, and valuable work, of 32 Pages, has just been handed us by the authors, Messrs York and Clement, of the San Francisco Bar;—and we can safely recommend it to all who need such a work, as reliable, and with a full supply of the proper forms, for use. Furnished by the RECORD OFFICE—price only 50 cents.

JUDGE WILLIAM THOMAS of Jacksonville, Ill., a veteran jurist of 32, is away on a wedding tour with a charming bride of 75 years.

RAILROADS AND THE PUBLIC LANDS

Secretary Schurz Adheres to his Former Decision.

The Secretary of the Interior has rendered an additional decision to that of the Commissioner of the General Land Office, in the well-known *Dudymott* case. The appeal was taken for reversal or suspension of the former decision. Secretary Schurz declines to do either, and the former decision, by which large tracts of land covered by land grants to railroads were opened to settlement is to stand unless reversed by decision of the Courts. Immense numbers of applications have been made to enter lands under the former decision. It is expected the railroads will take immediate steps to appeal to the Courts.

Secretary Schurz says; 'It has been from the earliest history of this Government, one of the most important and beneficent principles governing its land policy, not to favor the creation of large estates, but to put public lands at such rates and in such quantities within the easiest possible reach of the poor and homeless, that the latter might acquire homes for themselves and families, and thereby promote a healthy development of the agricultural resources of the country. This principle has evidently been kept in view by the law-making power when aiding the construction of national highways by extensive grants of land, and in accordance with it it was wisely provided in this grant that unless the lands granted were sold by the companies within a reasonable time they should be opened to actual settlement under the auspices of the Government of the United States and under the provisions of the pre-emption law, so that they might be acquired and settled upon by persons of limited means, while the proceeds of such sales are to be turned over to the companies. I am therefore of opinion that an actual sale to a *bona fide* purchaser for a valuable consideration within the time limited, is the only disposition which it

was intended by Congress should exempt any of said lands from sale under the pre-emption law. Counsel have filed certain mortgages, called deeds of trust, executed by said companies, to secure payment of bonded obligations of the same. Counsel argue that execution and delivery of these mortgages was in effect a sale and conveyance of legal title of the companies to all lands inuring to them under such grant. For the purpose of determining the question thus presented, it becomes necessary, not only to fix the character of the instruments executed by said companies, but also to ascertain whether legal title to lands therein described was by said instruments conveyed to the trustees therein named."

After quoting various prominent legal opinions on the subject of mortgages, to the general effect that a mortgage is mere security, and does not vest in the mortgagee any estate in land either before or after condition broken, and that payment after default operates to discharge a lien equally with payment at the maturity of the debt, the Secretary expresses the opinion that mortgages in the several States and Territories in which land granted by act of July 1862, and the act amendatory thereof, of July 2, 1864, are located, are not a conveyance of legal title, but simply a pledge, a security, a lien thereon, and that no estate is by such instrument vested in the mortgagee either before or after condition broken. In each and every one of the mortgages presented in this case the legal title, as well as the rights of sale and disposition of the lands therein ascribed, is retained in the Companies, the Trustees indorsing the mortgage with a full knowledge of the limitations of the right and authority of the companies, to make the same, while the companies by the terms of the mortgage, had the right to sell and dispose of the lands, the Trustees were to receive the proceeds of all sales of lands made. This right of the companies to sell lands having ceased by virtue of the third section of the Act of July 1, 1862, the security of the mortgages will be subrogated by moneys arising from sales when made by the Government. In concluding, the Secre-

tary says: "After full investigation I am unable to find any reason for suspension of my decision of July 23, 1878, and you will, therefore, without unnecessary delay, cause directions to be issued to local officers as therein directed."

ABSTRACT OF RECENT DECISIONS.

JOINT INDICTMENT.—In the case of *Cruce vs. The State*, the Supreme Court of Georgia held, that when two are tried jointly for an offense of which one may be convicted though the other be acquitted, the right of peremptory challenge, in its whole extent, is of the same practical importance to each as if he were being tried severally. By going to trial as the State has indicted them, that is, jointly, the prisoners do not waive any right of peremptory challenge. Each is entitled to his full statutory allowance. If the State is not prepared to afford the full allowance to each in a joint trial, it should demand a severance, and try the prisoners separately, unless they stipulate expressly to unite in their challenges, in which case they will be bound to do so. Without such express stipulation the court cannot oblige them to unite in their challenges.

INDORSEMENT OBTAINED BY FRAUD.—*Supreme Court of Ohio, in Kinglad vs. Jones*: "By fraud the maker of a note procured an accommodation indorsement on it, transferring it before due to a creditor, in payment of a pre-existing debt, the creditor giving time and surrendering collaterals. Unless complicity in the fraud, or knowledge of it at the time of taking the note, is proved against the creditor, the paper in his hands cannot be impeached. The creditor demanded security of his debtor, who, to obtain it, made fraudulent representation to the one who became surety. The creditor was ignorant of these representations and innocent as regarded the debtor's conduct."

MORTGAGE.—A man caused land which he had paid for to be deeded to his son. The son conveyed it in good faith to his wife, but without his father's knowledge. The father afterwards induced her to mortgage it to him in order that one of the son's creditors might be forced to make better terms. The mortgage was not intended as genuine security for a real debt. When the daughter-in-law asked that it be discharged, the father-in-law refused. Held that the mortgage could not be maintained without an obligation capable of proof, and should be set aside.

[Sup. Ct. of Mich.]

HASTINGS' LAW DEPARTMENT.

OF THE
UNIVERSITY OF CALIFORNIA.

OUTLINE COURSE OF STUDY.**JUNIOR YEAR.**

FIRST COURSE. I.—*The Law as to Persons.*
Text-book: Kent's Commentaries, Lectures 24 to 32. Works for collateral reading will be announced to the class. **II.—***The Law as to Personal Property.* *Text-book:* Kent's Comm., Lectures 35 to 38. **III.—**Outline of the *Law as to Contracts*, including the general doctrines which apply to all contracts and the general principles of the most important mercantile contracts. *Text-books:* Metcalf on Contracts, Parsons do., Kent's Comm., Lectures upon the various mercantile contracts.

SECOND COURSE. *The Law as to Real Property*, including its origin and history, and all its branches except Remainders, Uses and Trusts, Powers, and certain Equitable Estates. *Text-Books:* Blackstone's Comm., second book; Washburne on Real Property.

The Statutory Legislation of California and other Pacific States is referred to constantly throughout the studies of the whole year.

MIDDLE YEAR.

A full course of *Mercantile and Commercial Law*, embracing Corporations, Agency, Partnership, Sale, Bailments, Bills and Notes, Insurance, Shipping Contracts, Suretyship, etc.

Certain branches of Real Property, viz.: Remainders, Uses and Trusts, and Powers.

The law as to Last Wills and Testaments, and the Administration of the Estates of Deceased Persons.

Equity Jurisprudence. Constant reference will be made to the Statutory Legislation.

SENIOR YEAR.

Pleading and Practice according to the Reformed System of Procedure, with the general theory of common law forms of action, and of Common Law and Equity Pleading, Evidence, Constitutional Law, Criminal Law, Admiralty Law, Patent Law.

Lectures upon Medical Jurisprudence. The Principles of Morality in their effect upon the law and in their application to its practice, Public International Law, Private International Law or the Conflict of Laws, the Roman Law, General and Comparative Jurisprudence.

MOOT COURTS, ETC.

A Moot Court will be established for the argument of causes and the discussion of legal questions by members of all the classes. It is hoped that the students will also form debating societies or clubs.

The Senior Class will have constant exercises in the preparation of Pleadings, and other legal papers and written instruments of all kinds.

JOHN NORTON POMEROY, LL. D.

PROFESSOR OF MUNICIPAL LAW.

The CALIFORNIA LEGAL RECORD is a full and complete continuance—and the only one—of the publication of the *California Supreme Court decisions* from the close of the "San Francisco Law Journal," vol. 1., and will contain every decision rendered since the close of that volume, on February 23, 1878,—as rapidly and soon as time and space will permit.

There have also been added twelve decisions omitted from that work through the neglect of its former editor. We have nothing further to do with the "Pacific Coast Law Journal," nor has it any connection with us or this office.

F. A. SCOFFIELD & Co.,

Publishers and proprietors LEGAL RECORD.

CALIFORNIA LEGAL RECORD.

Vol. I.

SATURDAY, SEPTEMBER 21, 1878.

No. 25.

Legal Notes.

AN IMPORTANT LEGAL POINT.

A Man's Home Alienated While He is in an Insane Asylum.

A case has just been appealed to the Supreme Court from San Joaquin county, which presents a very interesting and important legal point, although it may not reach a decision for some months to come. According to the statement of a gentleman conversant with the case, Robert W. Spencer of San Joaquin county on September 17, 1868, borrowed of Walter K. Dell \$252, giving his promissory note due in 12 months, with interest at the rate of 3 per cent per month, and as security gave a mortgage on his homestead—100 acres of land—in that county, which he held by a patent from the United States.

In 1863 Spencer became insane and was confined in the State Insane Asylum at Stockton, where he remained until 1875 (about 12 years.) On September 2nd, 1867, Dell obtained a judgment for the debt of \$737 48, principal and interest, and a decree of foreclosure and sale of the premises. By an action in the Fifth District Court he procured the appointment, by the Court, of G. A. Shurtleff, an officer of the Asylum, as guardian *ad litem* for Spencer, there never having been a general guardian appointed.

This guardian was served with a summons and copy of the complaint, but Spencer only with the summons. No appearance was made in defense, and the judgment was obtained by default, and Dell bought in the land for \$958; and after the expiration of six months (time of redemption) procured a Sheriff's deed, which was recorded August 8, 1868.

Walter K. Dell then sold the land to Lewis B. Dell, and they both afterward made a joint deed to third parties, who deeded it in trust with other lands to Chas. H. Swift and Wm. P. Coleman, for a loan of \$4,000 from the Sacramento Savings Bank; and these trustees on March 11, 1873, deeded to the bank, for default in paying the loan, which has since held the title.

Spencer was discharged from the Asylum in 1875 as cured, and went home to his land, and went to work upon it, cutting wood, etc. Whereupon the bank brought an action of ejectment on

September 9, 1876, asking damages, and an injunction against further cutting timber, etc.

A jury was waived, and also findings, and the Court gave judgment in favor of the bank, and against the defendant.

Defendant moved for a new trial, with a statement of the case, claiming that the decree on which the land was first sold was void, the Court never acquiring jurisdiction of the person of the defendant Spencer, in that suit. The motion was denied, and the defendant appealed on August 14, 1878, from the order of denial, and the judgment. The decision is awaited with much interest, as a determination of the point whether a man can be sold out of his home while insane, and without having a hearing in court in defense, at least by a proper guardian of his person and estate.—

A PECULIAR WILL.—The will of Allan T. Wilson, sent from San Mateo to this city yesterday to be recorded, bequeaths one-half of testator's estate, valued at \$35,000 48, to his wife, and the remaining half to his young son, John Ward Wilson, subject to the following conditions: If he dies childless, the property shall go to the Orphan Asylum which has been longest established and in which no person in authority is a Roman Catholic. He is empowered to give his mother \$600 per year for her support, contriving, however, that she shall not give any money, not even to the extent of one dollar, to any Catholic priest, church or society. If the son attains the age of ten years, and then uses tobacco, alcohol, wine, beer, or other as beverages he shall forfeit all rights under the will, or pass a month, and live on nothing but bread and water, and each time he commits the offense the penance must be repeated. If after 18 years of age he shall drink or smoke he shall forfeit his estate, or, instead, work steadily for a year as a common farm laborer, and save one-half of his wages, and he shall so labor as to earn at least two-thirds of the wages farm laborers generally receive. If he becomes a Catholic, or after being 18 years he shall give any money whatever to a Catholic priest, or even layman, he shall forfeit his estate. The will adds that he may give small sums, not exceeding \$5 each, to really destitute persons, without asking any extensive inquiries as to whether he is a Catholic or not.—*Daily Bulletin, Sept. 18th*

THE PROTESTED TAX MONEY.

The Supervisory Finance Committee Report—Opinion of City and County Attorney Burnett.

At the meeting of the Board of Supervisors last evening, Mr. Smith, when the report of the Finance Committee was called for, said that at a previous meeting of the Committee Mr. Austin had told him that the money was safe. After the decision of the Supreme Court the City and County Attorney had told him that twenty-five days were allowed in which a rehearing could be asked, and that nothing could be done until after that time. After this time has expired, there will probably be decisions in favor of the city in the mandamus cases. Soon after Mr. Austin's death, he had called on Mr. Austin's relatives with reference to this money, but had found that they knew nothing of it. They said that Mr. Austin had no assets, and that there would be nothing. He then saw the City and County Attorney, but that gentleman did not alter his position. Mr. Burnett said that a demand would have to be made upon Austin's executors, and that the city would not have any interest in any property until after the decision of the Supreme Court.

Mr. Smith presented the following petition of the City and County Attorney in this matter:

"I have the honor to acknowledge the receipt of your communication of this date, asking whether in the present status of the protested tax cases there is any action which can be taken by the Board of Supervisors or its Finance Committee which can or will facilitate the collection of the amount due the city. In reply, I beg to state that pursuant to a resolution of the honorable the Board of Supervisors, passed some time since, two proceedings to procure writs of mandamus in the name of the State for the State's portion, and one in the name of the city and county of San Francisco, for its portion of the protest moneys, were commenced in the Supreme Court, and briefs having been filed therein, were argued and submitted some time since, together with six protest cases. Four of the protest tax cases were decided on the 2d instant. Two of the appealed protest cases and the two mandamus proceedings are undecided, and still under advisement in the Supreme Court. The four cases above mentioned were decided virtually in favor of the State and city; but the plaintiffs therein, who were the payers under protest, have until and including the 26th instant to file petitions for a rehearing, pursuant to the rules of the Supreme Court. At the end of that period, or as soon as

any petition for the rehearing that may be filed shall have been denied, of which denial I feel no doubt, the Fifteenth District Court will probably pass upon our motions for new trial in the eighty-nine cases therein pending, and those cases will probably be dismissed at once. Until after the happening of the event supposed, I know of nothing that can be done that will facilitate the collection of the moneys. Having resorted to the highest Court in the State for power, we must await its final action. Final disposition will, in all probability, be made within a very short time, of the causes mentioned above, and by that time will, of course, be appointed a legal representative, with whom the city can deal directly and properly in regard to the moneys."

Mr. Gibbs introduced the following, which was adopted:

Resolved, That the Finance Committee be and are hereby instructed to investigate as to the whereabouts of the moneys paid under protest as State, city and county taxes, and held by the late Alexander Austin, and to that end to send for such persons and papers as may in their judgment be necessary to ascertain as to the disposition of said moneys.

Mr. Smith said that an investigation could be made.

Mr. Danforth knew that the public was anxious to have the cases pressed, but the Finance Committee could do nothing for a little while.

Mr. Gibbs thought that the Committee ought to trace the money, if possible, and find where it was.—*Daily Bulletin*, 17th inst.

Official Inquiry by the Finance Committee of the Board of Supervisors—How it was Drawn from the Bank of California—Testimony of Louis McLane, Senator Sharon, Thomas Brown, Joseph Austin and Others.

Tuesday afternoon there was a meeting of the Finance Committee for the purpose of making some inquiries as to the whereabouts of the protested taxes received by the late Alexander Austin, when Tax Collector, and now due the city. Louis McLane, President of the Nevada Bank, and Jennings A. Cox, Mr. Austin's partner, were summoned to appear before the Board, and were present. The meeting was held in pursuance of the resolution passed in the Board of Supervisors Monday evening.

LOUIS McLANE'S TESTIMONY.

Louis McLane was first examined by the Committee, and said: "Mr. Austin had a small account at the bank from October, 1874, to September, 1875. It did not exceed, in the aggregate, \$60,000. It was a

private account. No money came from the Bank of California on Austin's account. With regard to money deposited to the account of J. M. Walker & Co., you would have to ask them where the money came from. I could not say whether or not this tax money was included in the money deposited by Walker & Co. The depositor alone has the knowledge as to where the money comes from. I could only give Walker & Co.'s accounts by order of Court and in open Court. If they had deposited \$200,000, we should not be able to tell where it came from.

Mr. Smith—If we could find that money had been drawn from the Bank of California, could we obtain tags in your bank, if they were there, that would show the transfer of this money?

Mr. McLean—Perhaps you could.

SENATOR SHARON'S TESTIMONY.

Senator William Sharon was next called, and said: I have never made an examination of the affairs of the Bank of California, and I could not state whether or not Mr. Austin had money there. I did not pay to Mr. Austin any money after the failure of the bank, and nothing passed through me. My information on this subject would be of no use to you. Nothing was ever paid to Austin by me.

THE DECEASED'S BROTHER'S TESTIMONY.

Joseph Austin, brother of the late Alexander Austin, testified that he did not know anything about this money. Nothing had been left by his brother, and he had been told nothing regarding the protested tax.

TESTIMONY OF THOMAS BROWN, CASHIER OF THE BANK OF CALIFORNIA.

The testimony of Thomas Brown, Cashier of the Bank of California, showed that Austin held, at the time of the failure of the bank, certificates of deposit amounting to \$200,000, issued by W. O. Ralston. These certificates were paid as follows: A certificate for \$50,000 was paid in coin October 9, 1875. A certificate for \$75,000 was paid December 6th, by two other certificates, one for \$50,000 and one for \$25,000. The former was taken up December 16th by two certificates, one for \$50,000 and one for \$25,000, the latter of which was paid the same day, the former being paid January 16th, 1876. One was paid in coin and one in a draft on the Nevada Bank. The check was deposited by J. M. Walker & Co. April 31st, 1876, a certificate for \$50,000 was paid by check on the bank to the order of Alexander Austin, endorsed by him and by J. M. Walker & Co., and stamped by the Nevada Bank. May 3d another certificate for \$50,000 was paid in the same way, and on July 29th two certificates for \$50,000 each were also paid in the same way, the checks being endorsed by Austin and J. M.

Walker & Co.

TESTIMONY OF ONE OF MR. AUSTIN'S PARTNERS,

JENNINGS S. COX.

Jennings S. Cox, a member of the firm of J. M. Walker & Co., testified that Austin became a member of the firm October 27, 1875. Austin was credited with \$50,000 for his Board seat, and the next day put in \$10,000. It was agreed by the firm that each partner could make deposits with the firm, and draw interest on them while there. Austin deposited \$14,000 in December, 1875; \$50,000 in April, \$50,000 in May and \$101,500 in July. His total deposits aggregated \$205,500 75. He drew out \$200,550 11. There was an agreement that the members of the firm should charge themselves with guaranteed losses by reason of inadequateness of margins. Austin's share amounted to \$44,964 58. His individual losses were \$60,730 51. The statement of Mr. Austin's account with the firm is as follows:

Credits.

Aggregate deposits.....	\$205,130 75
Interest credits.....	27,400 24
Credit by Board seat.....	50,000 00

Total.....	\$282,530 99
Due firm by Austin.....	500 20

Grand total.....\$283,330 20

Debits.

Total amount drawn out.....	\$200,551 11
Loss on guaranteed accounts.....	44,964 58
Loss on individual stock account.....	60,730 51

Total.....\$206,246 20

Austin examined and accepted his accounts long before he died. The money was considered to belong to Austin individually, and an agreement was made to pay it over when he should need it. It was not known as protested taxes. Austin drew his money out at various times, but the other partners do not know what was done with it. They thought that he must be depositing it somewhere. Austin drew out \$200,551 on checks.

TESTIMONY OF THE HEAD OF THE FIRM.

J. M. Walker, another partner in the firm, said that he did not know where the money was. It had always been a mystery to him what Austin did with the money after drawing it. He had never talked to Austin with regard to his private affairs. When a member of the firm paid in money above the \$50,000 required as capital, it was understood that it was on his individual account, and he was allowed interest. It was on call all the time. At one time witnesses thought that Austin, when he

was withdrawing the money, was settling up with the city. Each member of the firm was allowed to draw \$300 per month for personal expenses. Witness did not know that Mr. Austin had speculated outside, or that he had lost money other than was shown in the accounts of the firm. He had taken Mr. Austin to task for bringing in the name of the firm when he was before the Finance Committee, and had been told that the reporters had misrepresented him. Mr. Walker thought that Mr. Austin had not been in his right mind for six months.—*Daily Bulletin*, September 18th

A NOVEL LAWSUIT.—The Civil Tribunal of the Seine has just had before it an action brought by Madame Quentin-Proffit against the Prince and Princess Gallatin, to recover 6,000 francs for services rendered. The plaintiff is a matrimonial agent, and about three years ago the Princess, at the recommendation of a friend, applied to her to find a suitable partner for her son, who desired to get married. After lengthened negotiations a lady was found, and an interview arranged, but the affair was eventually broken off. Madame Quentin-Proffit then sent in her bill, thus composed: Carriages, 483 francs; cost of toilettes, 1,000 francs; money expended, correspondence, etc., 150 francs; honorarium, 4,418 francs; total 6,000 francs. The court appeared to think the charge high for the services rendered, and awarded 550 francs only.

IMPORTANT:—THE NEW TIMBER LAND LAW. On another page we print the new Circular of instructions to the Registers and Receivers of the United States District Land Offices in California, Nevada, Oregon, and Washington Territory,—for the carrying out of the *New Timber Land Law* of June 3rd 1878:—together with the proper forms, and affidavits, in full.

Also, an extract from the U. S. Revised Statutes, defining Perjury and its penalty in that connection.

We published the Act itself in full text, in RECORD No. 15, of July 6th,—which we can furnish to any who desire, for future reference.

SUPREME COURT OF CALIFORNIA.

JULY TERM, 1878.

Unwritten Decisions.

(Decided September 17, 1878.)

COMMERCIAL BANK, Plff. and App't.,
vs.
E. J. BALDWIN, Deft. and Resp't. } No. 5895.
Appeal from Twelfth District Court, San Francisco.
DANFORTHFIELD, Judge.

JUDGMENT BY DEFAULT.—Stipulated extension of time expiring on Sunday, judgment is recovered.

STATEMENT OF THE CASE.

This is an appeal from an order setting aside a judgment by default, and allowing the defendant to answer.

The action was brought on October 2, 1876, to recover \$84,000 for alleged subscription to the capital stock of plaintiff.

On January 30, 1877, by stipulation, five days further time was granted to answer, the last day of the time falling on Sunday. On the next day, Monday, about 2 o'clock p. m., upon application of plaintiff to the court, judgment was rendered by default.

Upon an affidavit of merits, by defendant and his counsel, accompanied by his verified answer, the court issued an order to show cause why the default and judgment should not be set aside. Plaintiff objected on two grounds; 1st, That while when the time allowed by law expires on Sunday, the party is entitled to the whole of the following Monday, yet this rule does not apply where the time is fixed by stipulation. (*Kilgour vs. Giles*, 6 Gill & Johns, 268. *Pierpoint vs. Graham*, 4 Wash. C. C. R., 341. *Cent'l Bank vs. Alden*, 41 How., P. R., 102. *Tidd's Practice*, 474.) [The counsel claimed that the above "show the general rule," but that the question is one of *statutory construction*, and not of *authority*.] 2d, That, as the stipulation was not filed with the clerk of the court, the party giving it may disregard it, and it becomes null and void. (Code C. P., Sec. 283. *Merritt vs. Wilcox*, July term, 1877. *Borkheim vs. N. B. & M. I. Co.*, 38 Cal., 638. *Smith vs. Pollock*, 3 Cal., 94.) The defendant claimed the rule as well settled in all matters of practice that, where the last day falls on Sunday, it is excluded from computation. (*Bissell vs. Bissell*, 11 Barb., 97. *National Bank vs. Williams*, 46 Mo., 17. *Salter vs. Burt*, 20 Wend., 305. Sec. 12, C. O. P.)

To the second objection defendant cited *Watson vs. S. F. & O. R. R. Co.*, 41 Cal. *Swift vs. Camovan*, 47 Thompson, 86. In New York an order opening a default is not appealable, upon the ground that it is discretionary and does not affect any substantial rights. *Ramsay vs. Gould*, 4 Lans., 478. *Her-*

man vs. Sawyer, 48 Cal., 562.

Whereupon plaintiff appealed from order opening the default.

Greene & Pillsbury, Attorneys for plaintiff and appellant. *McAlister & Bynum*, Attorneys for defendant and respondent.

Order affirmed. Remittitur forthwith.

Unwritten Decisions.

(Decided September 12, 1878.)

FRED'X. TOBLEMANN, Plff. and Resp't.,
vs.
JOSEPH W. REAY, et al., Dft. and App't. } No. 5687.

Appeal from Third District Court, San Francisco.
S. B. McKee, Judge.

STREET ASSESSMENT—BILL OF EXCEPTIONS.

STATEMENT OF CASE.

On October 21, 1875, the Superintendent of Public Streets in San Francisco, in pursuance of a resolution of the Board of Supervisors, made an assessment on lot No. 4, (per diagram) on Elm Ave. belonging to defendant, for \$145.20, to cover expense of work done by Thomas Byrne, under contract for re-grading Elm Ave. against said lot. Afterward Thomas Byrne assigned all his interest in the contract to the plaintiff, Toblemann, who prays judgment for the amount. Demurrer of defendant overruled, and answer made that the Board of Supervisors had no jurisdiction to order the work, and could not acquire jurisdiction until the street had first been graded.

Cause tried without a jury, and judgment rendered for plaintiff for \$145.20 and interest. Defendant filed bill of exceptions on appeal, to which plaintiff objected, on the ground that the court could not settle a bill of exceptions more than 30 days after an appeal from the judgment, and 40 days after its entry. No authorities cited on the appeal.

J. O. Bates, attorney for plaintiff and respondent. *D. H. Whittemore*, attorney for defendant and appellant.

Judgment reversed, and cause remanded.

Unwritten Decisions.

(Decided September 12, 1878.)

J. M. ELLEN, et al Plff's and App'ts.,
vs.
GEO. S. KNEELAND, et al., Dft's & Resp'ts. } No. 5700.

Appeal from Nineteenth District Court, San Francisco.

— Judge.

CONTRACT—Breach of WARRANTY.

STATEMENT OF CASE.

On March 24, 1872, the defendants made a writ-

ten agreement with one T. R. Hutchinson, (the assignor of these plaintiffs,) defendants signing their firm name—in which, in consideration of the payment of \$100 down by Hutchinson, they bargained to him their clip of wool for the spring of 1872—2,000 fleeces, more or less—for the price of 46 cents per pound, to be delivered before the first of August, 1872. The agreement contained the following: "They (dft's) also warrant said wool to be in good order and condition, well tied and honestly packed, free from sticks, stones, straw, earth, burs or any foreign matter."

Plaintiff claimed a breach of this warranty in the contract in that the wool, when delivered, contained a quantity of wild carrot seed, commonly called "beggar's lice," so much as to deteriorate its market value from 5 to 7 cents per pound, and that plaintiff thereby sustained damage in the sum of \$943 90, and asks judgment for that amount.

Defendants denied each allegation, and for a separate defense, showed that the before named Hutchinson brought an action in this court on December 18, 1872, before a jury, which gave a verdict for these defendants. A demurrer to this separate defense was sustained.

An instruction was given by the court to the jury, to the effect that if they believed the testimony of the witnesses, Powell & Rodgers, their verdict should be for defendants. Judgment was rendered for defendants; motion for a new trial made and denied, and the plaintiffs appealed from the judgment and the order denying motion for a new trial; and claim that the instruction of the court was erroneous, as it was, in fact, telling them that one fact must be presumed from the existence of another—which had been condemned by this court in *McNeil vs. Barney*, 51 Cal., 999, and *People vs. Walden*, Id. 568.

Lattimer, Morrow, & Pruffett, attorneys for plaintiff and appellant. *J. H. McShurt*, attorney for defendants and respondents.

Judgment and order reversed.

Unwritten Decisions.

(Decided September 12, 1878.)

DAVID RONDENBURN, Plff and Resp't.,
vs.
ALLEN I. GLADDING, Dft and App't } No. 5703.

Appeal from Third District Court, Alameda Co.
S. B. McKee, Judge.

SATISFACTION OF JUDGMENT.

STATEMENT OF CASE.

Plaintiff brought action for \$663 68, as due him from defendant, and obtained a judgment therefor. Afterwards, at a sale under a decree of fore-

closure by one Walter Hawxhurst vs. the Defendant, on September 1, 1873, this plaintiff became purchaser of the lands sold, and thereafter, before the expiration of six months—and while the above judgment was still in force—the defendant made to plaintiff a full deed of conveyance and quit-claim of right of redemption to said lands as a full satisfaction of the judgment.

But plaintiff afterward refused to enter satisfaction of record of the judgment, whereupon defendant moved the court to recall execution, and satisfy the judgment of record, which was denied, and defendant appealed from the order of denial, and, while admitting a conflict of evidence, (which, as a rule of law, precludes a review of the decision by the higher court, if on a point of fact,) yet in this case, it does not apply, as all the evidence offered was affidavits which may be readily examined by the higher court.

Plaintiff asks the dismissal of the appeal, because the proceedings do not come under any of the cases in Section 963, C. C. P., and because the order is not "appealable," and because there is no bill of exceptions filed.

S. F. Gilechrist, attorney for plaintiff and respondent. *Moore & Vrooman*, attorneys for defendant and appellant.

Amendment to the transcript herein filed by consent. Cause argued by Vrooman for appellant, and order affirmed.

Unwritten Decision.

(Decided September 19th, 1873.)

J. S. DYER, Plff. and App't,

vs.

J. P. TREADWELL et als., Deft's & Resp'ts. } No. 5723

Appeal from Third District Court, San Francisco,
S. B. McKee, Judge.

STREET ASSESSMENT—WANT OF JURISDICTION INSUFFICIENT PETITION.

STATEMENT OF CASE.

This action was brought to recover an assessment of \$600 00, levied April 10, 1873, on a lot of land on Filmore street belonging to defendants, for expense of grading as authorized by the Board of Supervisors, the plaintiff being the original contractor who did the work. Defendants, in answer, denied the jurisdiction of the Board by non-publication of Resolution of Intention or notice, as required by law.

Cause was tried without jury, and the Court found that the petition requisite to give the Board the necessary jurisdiction to order said grading did not represent the majority of the frontage liable to assessment for said work. That therefore by reason of insufficiency of said petition, the

Board of Supervisors *never acquired jurisdiction* to order said grading done; and judgment was entered for defendants May 15, 1877. Plaintiff appealed from the judgment, claiming that the finding of the Court that one of the petitioners did not own land liable to be assessed, and by leaving him out the petition became insufficient, was a finding *outside of the issues raised*, and should not have a bearing on the decision.

Statutes 1871-3, Page 805, Section 4.

J. M. Wood, Attorney for Plaintiff and Appellant.

D. H. Whittemore, Attorney for Defendants and Respondents.

Judgment affirmed.

SUPREME COURT RECORD

[JULY TERM, 1878.]

NOTE, of Sept. 17th—Criminal Cases will be placed on either Calendar at Los Angeles or Sacramento, on motion of Defendants. Counsel are requested to notify the Clerk of the Court at San Francisco, by telegram, on or before Saturday Sept. 21st.

APPEALS DISMISSED:—Sept. 19th No. 6248 & 6249.—City and County of San Francisco vs. Smith et al—on motion of Drown for—

REHEARING:—Sept. 18th, No. 5908.—Estate of Crosby, deceased—Petition for, and stay of proceedings,—on motion of Houghton and Reynolds for Respondents.

ADMITTED TO PRACTICE:—Sept. 17th, J. B. Hayne,—on motion of H. E. Highton and license from Supreme Court of Georgia.

Sept. 17th—Wm. T. Baggett,—on motion of J. E. McElrath, and license from Supreme Court of Tennessee,

Sept. 18th—Jno. R. Kittrall,—on motion of Wm. Craig, and license from Supreme Court of Nevada.

J. H. W. RILEY,

A. K. WHITTON.

RILEY & WHITTON,
COURT REPORTERS,
Office, Room 65 Nevada Block.

J. H. W. Riley, Official Reporter, Nineteenth District Court

U. S. Land Decisions.

SPANISH TITLES IN CALIFORNIA.

Pedro Chaboya, Salvador Chaboya, et al., vs David Umbarger et al.

The following decision was made by the United States Supreme Court, September 16th:

Pedro Chaboya, Salvador Chaboya et al. vs. David Umbarger, Dennis Leay, William Swall et al. In error to the Supreme Court of the State of California.

Pedro Chaboya obtained in this Court, at its December term, A. D. 1888, the confirmation of his title to 500 acres of land under claim of a grant of the Mexican Government. (3 *Black R.*, 586). The proceeding was commenced before the Board of Land Commissioners under the act of 1851, and they decided against him. On appeal to the District Court it was found that the land described in his petition was not the land of which he sought confirmation, and the Court held that it had no jurisdiction on appeal to confirm any other land than that described in his petition to the Land Commission. An act of Congress was passed to remedy this defect, which authorized the District Court to hear and decide his claim to the land known as La Posa San Juan Bautista. (13 *U. S. Stat.*, 907).

This claim was for about two leagues. The District Court confirmed his claim to 500 acres—part of the tract known as La Posa de San Juan Bautista—and rejected the remainder of it. On cross appeals by the United States and by Chaboya, the decree of the District Court was affirmed.

Chaboya having parted with the title thus confirmed to him, but retaining the possession of the property, the present defendants in error, in whom the title had become vested, instituted a suit against him and others in the proper State Court of California to obtain possession of the land. In this action they were successful, and Chaboya and his co-defendants having carried the case to the Supreme Court of California without success, have brought it here by writ of error from that Court.

The title relied on by Chaboya as a defense to the action was a decree of the District Court of the United States for the Western District of California, rendered in pursuance of a mandate of this Court, on the 18th day of June, 1888. The rejection of a properly certified copy of this decree by the Court, when offered in evidence by plaintiffs in error, is one—if not the only—error

to be considered here.

The case in which that decree was rendered originated in a petition of the Mayor and Council of the city of San Jose to the Board of Commissioners, already mentioned, for the confirmation of the title of said city as the successor to the Mexican pueblo of that name, to certain land or commons belonging to the pueblo. The east boundary of this decree, as finally settled by the Supreme Court, included the land now in controversy, and then in the possession, as it had been a long time before, of Chaboya and his family.

That decree, however, excepted from this confirmation certain specified ranchos, "and also such other parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, all of which said excepted parcels of land are included in whole or in part within the boundaries above mentioned, but are excluded from the confirmation to the Mayor and Common Council of the city of San Jose."

As Pedro Chaboya had set up a grant from the Mexican authorities of this five hundred acres, and as it had been confirmed to him by the Supreme Court of the United States, the highest tribunal to which such questions could be submitted, it would seem that it was excluded from the confirmation of the pueblo title, and that the Court was right in rejecting the decree as evidence of title to that land. On the face of the matter, as thus stated, the Court is clearly right.

But, it is said, in opposition to this view of the matter, that the District Court, when it confirmed the title to Chaboya, was acting upon a matter wholly beyond its jurisdiction; that its decree was therefore void, and that grants not vested in private proprietorship by lawful authority, and not confirmed by tribunals authorized to do so, are not among those excluded from confirmation by the decree in the San Jose case.

It would be a very strained construction of the words used in that decree, to hold that when it excludes from its operations private land claims confirmed by the tribunals of the United States, it was intended to leave open in each of said cases an inquiry into all the circumstances which authorized the act of confirmation. The word tribunals was evidently selected with reference to several bodies which had authority to make such confirmation. The Congress of the United States, the Supreme Court, the District Court, and the Board of Land Commissioners had each authority to confirm titles originating under the

Mexican Government. The purpose of the excepting clause in the decree was not to give any additional validity to these confirmations, nor to determine whether they had been rightfully made, but to prevent any conflict between the decree the Court was then rendering and that of any other lawful tribunal which had acted on the same subject. It was as much the intention to prevent a conflict of jurisdiction as a conflict on the merits. It was intended to say, that as to any parcel of land which had been confirmed to private parties by one of these tribunals, we leave it where we find it. We make it neither better nor worse. If the confirmation gives a good title, we cannot impair it. If it gives no title, the rival claimants must be left to their rights without embarrassment by the present decree. That this was the meaning of the Court is evident from the exclusion of land to which claims shall hereafter be confirmed by those tribunals.

Whether, therefore, the case of Chaboya was strictly within the power conferred on the District Courts, or not, when it rendered its decree, may be a matter of inquiry when that decree is produced as a source of title, but is not material in ascertaining whether the land embraced in it was excluded from the decree of the same Court in the San Jose case. That Court having confirmed this 500 acre tract to Chaboya, would very naturally exclude it with other confirmed claims from the operation of the decree rendered four years later.

As plaintiffs in error claim nothing under the decree of 1868, it is held that they cannot bring the case here on the question of Chaboya's possession. Affirmed.

Mr. Justice Miller delivered the opinion.—
Daily Bulletin, September 25th,

NEW TIMBER LAND ACT,

CIRCULAR.

To The Registers And Receivers of United States District Land Offices in California, Nevada, Oregon, and in Washington Territory.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

Washington D. C., August 13, 1878.

GENTLEMEN: Your attention is directed to the first, second and third sections of the Act of Congress approved June 8, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory." These sections provide for the sale of sur-

veyed lands not yet proclaimed and offered at public sale, valuable chiefly for timber and stone, unfit for cultivation, and, consequently, for disposal under the Preemption and Homestead laws.

I refer you to the terms of the Act, a copy of which is annexed. The provisions of the sections indicated, which are in specific language, must be strictly observed. When a party applies to purchase a tract thereunder, you will require him to make affidavit that he is a citizen of the United States by birth or naturalization, or that he has declared his intention to become a citizen under the naturalization laws. If native-born, proof of evidence of that fact will be received. If not native born, record evidence of the prescribed qualification must be furnished. In connection therewith, he will be required to make the sworn statement in duplicate, according to the attached form, No. 1, as provided for in the second section of the Act. One of the duplicate statements filed in each case is by the Act required to be transmitted to this office, and you will accordingly send up with your monthly returns the duplicate statements to be transmitted for the month.

The evidence in regard to the publication of notice, required to be furnished in the third section of the act, must consist of the affidavit of the publisher or other person having charge of the newspaper in which the notice is published, with a copy of the notice attached thereto, setting forth the nature of his connection with the paper, and that the notice was duly published for the prescribed period. The evidence required in the same section with regard to the non-mineral character of the land, and its unoccupied and unimproved condition, must consist of the testimony of at least two disinterested witnesses, who must swear that they know the facts to which they testify from personal inspection of the land and of each of its smallest legal subdivisions, as per form attached, No. 2. This testimony may be taken before the register or receiver, or any officer using an official seal and authorized to administer oaths in the land district in which the land lies. Upon such proof being produced, if no adverse claim shall have been filed, the entry applied for may be allowed in pursuance of the provisions of the act. The receiver will issue his receipt for the purchase money, and the register his certificate of purchase, numbering the entry in the regular cash series. Forms of application, receipt, and certificate are attached, Nos. 3, 4 and 5. You will enter the sale on your books and make the usual returns therefor to this office, noting on the monthly abstracts opposite the entry, and on the entry papers, a reference to the Act of Congress under

which allowed. You will forward all the papers in the case with the returns to this office, except the retained duplicate statement filed under the second section of the act, to which you will give the same number with the other papers for the entry, and retain it on the appropriate file with the formal application in your office.

You will be entitled to a fee of \$5 each for allowing an entry under said Act, and jointly at the rate of \$2½ cents per hundred words for testimony reduced by you to writing for claimants, which will be accounted for other fees.

If, at the expiration of the sixty days' notice provided for in the third section of the act, an adverse claim should be found to exist, calling for an investigation, you will proceed in the case according to the Rules of Practice approved November 26, 1875, pages 7, 8 and 9 of pamphlet.

In case of an association of persons making application for such entry, each such person must prove the requisite qualifications, and their names must appear in, and be subscribed to, the sworn statement as in case of an individual person. They must also unite in the regular application for entry, which will be made in their joint names as in other cases of joint cash entry.

The forms herewith may be adapted to cover applications of this class,

[FORM NO. 1.]

Sworn Statement under Act of June 3, 1878.

LAND OFFICE AT,

(Date), 18.....

I,, of County,, desiring to avail myself of the provisions of the Act of Congress of June 3, 1878, entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada, and in Washington Territory," for the purchase of the of Section, Township, of Range, do solemnly [swear or affirm] that [here state whether the applicant is a citizen of the United States by birth or naturalisation, or has declared his inten-

tion of becoming a citizen;*] that the said land is unfit for cultivation, and valuable chiefly for its [timber or stone;] that it is uninhabited; that it contains no mining or other improvements, [here except such as were made for ditch or canal purposes, if any, or such as were made by or belong to the applicant, if any,] nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself.

Sworn to and subscribed before me this day of 18.....

Register [or Receiver.]

[FORM NO. 2.]

Testimony of witness under Act of June 3, 1878.

....., being called as a witness in the support of the appli-

* In case the party has been naturalized, or has declared his intention to become a citizen, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished.

cation of to purchase the of Section, Township....., of Range, testifies as follows :

Ques. 1. What is your post office address, and where do you reside ?

Ans.

Ques. 2. What is your occupation ?

Ans.

Ques. 3. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions ?

Ans.

Ques. 4. When and in what manner was such inspection made ?

Ans.

Ques. 5. Is it occupied, or are there any improvements on it, not made for ditch or canal purposes, or which were not made by or do not belong to the said applicant ?

Ans.

Ques. 6. Is it fit for cultivation ?

Ans.

Ques. 7. What causes render it unfit for cultivation ?

Ans.

Ques. 8. Are there any salines or indications of deposits of gold, silver, cinnabar, copper, or coal on this land ? If so, state what they are, and whether the springs or mineral deposits are valuable ?

Ans.

Ques. 9. Is the land more valuable for mineral, or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone ?

Ans.

Ques. 10. From what facts do you conclude that the land is chief-

ly valuable for timber or stone ?

Ans.

Ques. 11. Do you know whether the applicant has, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself ?

Ans.

Ques. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon ?

Ans.

I HEREBY CERTIFY that witness is a person of respectability; that each question and answer in the foregoing testimony was read to before signed name thereto; and that the same was subscribed and sworn to before me this day of, 18.....

[The testimony of two witnesses, in this form, taken separately, required in each case.]

[FORM No. 3.]

Cash Application.

No.

LAND OFFICE AT,

(Date), 18...

I,, of County,, do hereby apply to purchase the of Section, in Township, of Range, containing acres, according to the returns of the Surveyor General, for which I have agreed with the Register to give at the rate of per acre.

I,, Register of the Land Office at, do hereby certify that the lot above described contains acres, as mentioned above, and that the price agreed upon is per acre.

....., *Register.*

[FORM NO. 4.]

Cash Receipt.

No.

RECEIVER'S OFFICE AT,

(Date), 18...

Received from, of county,, the sum of dollars and cents; being in full for the quarter of Section No., in Township No., of Range No., containing acres and hundredths, at \$. per acre. \$.....

....., *Receiver.*

[FORM NO. 5.] •

Cash Certificate.

No.

LAND OFFICE AT,

(Date), 18....

It is hereby certified that, in pursuance of law,, of

..... county, State of, on this day purchased of the Register of this office the lot or of Section No., in Township No., of Range No., containing acres, at the rate of dollars and cents per acre, amounting to dollars and cents, for which the said ha... made payment in full as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office, the said shall be entitled to receive a patent for the lot above described.

....., *Register.*

REVISED STATUTES OF THE U. S.

TITLE LXX.—CRIMES.—CH. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. [See § 1750.]

Book Notice. and Review.

"LAW OF MECHANICS' LIENS" OF CALIFORNIA —with explanatory remarks. For mechanics, and material men. This accurate, complete, and valuable work, of 32 Pages, has just been handed us by the authors, Messrs York and Clement, of the San Francisco Bar;—and we can safely recommend it to all who need such a work, as reliable, and with a full supply of the proper forms, for use. Furnished by the Record Office—price only 50 cents.

SUPREME COURT CALENDAR.

OCTOBER TERM.

Court meets at Los Angeles on Monday, October 14th.

MONDAY, OCTOBER 14TH.

Motions.

Examination of applicants for admission to practice.

TUESDAY, OCTOBER 15TH.

- 10,342—People vs. Piatt.
10,344—People vs. Fine.
10,365—People vs. Pallitpa.
4411—Felton et al. vs. Robia von.
6312—Keehan vs. Harper.

WEDNESDAY, OCTOBER 16TH.

- 5972—McCoy vs. Briant et al.
5930—McCarthy vs. Morse.
6476—Babe vs. Coyne.
6120—Maxey vs. Forster et al.
6125—Harper et al. vs. Rowe et al.

THURSDAY, OCTOBER 17TH.

- 6261—McDonald vs. McFarlan et al.
6264—Figg vs. Price.
4567—Morelhaus et al. vs. Wilson et al.
5963—Boland et al. vs. Grayson et al.
5973—Huston et al. vs. Leach et al.

FRIDAY, OCTOBER 18TH.

- 5972—Miller vs. Curry et al.
6006—Rousseau vs. Hall et al.
6020—Reynolds vs. Hall et al.
6024—Bolen vs. San Geronimo Plumbing Company.
6026—Price vs. Riverside Land and Irrigating Company.

MONDAY, OCTOBER 21ST.

- 6261—Sherwood vs. Meyerstein.
6262—McGinness vs. Edwell.
6267—In the matter of the estate of John B. Avaline, deceased.
6268—In the matter of the estate of William Baldwin, deceased.
6267—Jackson vs. Le Bar et al.

TUESDAY, OCTOBER 22ND.

- 6267—Berry vs. Clark.
6261—Cadd vs. Clark.
6264—Sterling vs. Whaley.
6267—Sterling vs. Whaley.
5920—Orena vs. Dewianey.
5922—People vs. Gutierrez et al.

WEDNESDAY, OCTOBER 23RD.

- 6265—Carty vs. Suell.
6266—Kaeling vs. Supervisors of Santa Barbara county.
6266—More vs. Stone.
5953—Union Consolidated Mining Company vs. Pascadero.
5465—Farnell vs. Yeakum et al.
5951—Putnam vs. Clark et al.

THURSDAY, OCTOBER 24TH.

- 5916—Fontaine vs. Southern Pacific R. R. Co.
6 26—Morgan vs. Chester.
6047—Gregg vs. Pemberton.
6 42—Artok vs. Kern Valley Bank.
6042—Burke vs. Pemberton.

FRIDAY, OCTOBER 25TH.

- 6072—People vs. Well.
6072—Livermore et al. vs. Jewett et al.
6122—Livermore et al. vs. Webb et al.
6121—Livermore et al. vs. Green et al.
6121—Livermore et al. vs. Jewett et al.

MONDAY, OCTOBER 26TH.

- 6122—Southern Pacific Railroad Company vs. Supervisors of Kern county.
5922—Perry et al. vs. Young et al.
5922—Johnston vs. Hellman.
5927—De Cella vs. Brinson.
5920—Du Cella vs. MacLay et al.

TUESDAY, OCTOBER 27TH.

- 5927—Crux vs. Martinez.
5972—Phelps vs. Avise.
6042—Goss vs. Streitz et al.
6051—Farmers and Merchants' Bank of Los Angeles vs. Downey.
6022—Dupuy vs. Merrill.

WEDNESDAY, OCTOBER 28TH.

- 6022—Haddock vs. Lopez et al.
6074—Haddock vs. Rocha et al.
6024—Easman vs. Pota.
6116—Gulian vs. Quimby.
6 42—Hampton et al. vs. Blanchard.
6122—Thomas vs. Lawlor.

THURSDAY, OCTOBER 29TH.

- 6122—Perry, Woodworth & Co. vs. Hellman.
6120—Canada Life Assurance Co. vs. Freeman.
6264—Stevens vs. de Cardona et al.
6262—De Cota vs. Wolfkill et al.
6112—City of Los Angeles vs. Butler et al.

FRIDAY, NOVEMBER 1ST.

- 6262—O'Connor vs. Good et al.
6262—O'Connor vs. Hazard et al.
6264—O'Connor vs. Frasier et al.
6265—O'Connor vs. Addin.
6262—Lacy vs. B'andry.
6264—Newmark & Co. vs. Chapman.
6262—Fletcher vs. Mower.

The CALIFORNIA LEGAL RECORD is a full and complete continuance—and the only one—of the publication of the *California Supreme Court decisions* from the close of the "San Francisco Law Journal," vol. 1., and will contain *every decision* rendered since the close of that volume, on February 23, 1878,—as rapidly and soon as time and space will permit.

There have also been added *twelve* decisions omitted from that work through the neglect of its former editor. We have nothing further to do with the "Pacific Coast Law Journal," nor has it any connection with us or this office.

F. A. SCOFFIELD & Co.,

Publishers and proprietors LEGAL RECORD.

603 WASHINGTON St.

(S. W. Corner Montgomery.)

SAN FRANCISCO, CAL.

CALIFORNIA LEGAL RECORD.

Vol. I.

SATURDAY, SEPTEMBER 28, 1878.

No. 26,

Legal Notes.

VOLUME CLOSED.

This issue closes our Volume,—(Vol. I. of the "LEGAL RECORD," but completing a full year published from our office, including the "San Francisco Law Journal," vol. I., of which the RECORD is the only full and complete continuance, as it contains in a June No. the 12 decisions omitted from the S. F. L. J. by neglect of our former editor and partner).

In this volume, since March 30th, we have reported 193 decisions of our Supreme Court, with appropriate Statements of Facts, etc., being *every written opinion*, and nearly every unwritten decision rendered—and *absolutely every one* rendered since the commencement of the July term, to date.

Also, 26 important land decisions, and much other interesting and valuable current Legal matter, sparing no time, pains or space to render our work a really valuable and indispensable adjunct to the libraries of the Bar and Bench of our State.

And we feel that our labor and efforts, although under some discouragements, have been well appreciated and repaid by the warm sympathy and support so generally shown us; and we shall enter on our new volume with far brighter prospects than ever before; and can safely assure our *largely* increased and extended patronage of a continued increase of the improvements to the RECORD that we have of late initiated. Our Index is being very carefully prepared, and will be issued at once, and forwarded to all subscribers except such as have already sent us their numbers for binding, or may do so before it can reach them. We shall continue, in future, as in the past, to publish:—1st. *Every decision* of our Supreme Court, as soon as possible after rendition;—and then, as much other of the most valuable legal matter accessible, as is possible, including, also, some valuable papers on important legal subjects, contributed expressly to the RECORD; and the most important land decisions, as affecting our State.

We shall welcome contributions and sug-

gestions from all quarters, for we fully believe in the mutual benefit principle as applied to a good Legal publication. We shall continue to send to all our old subscribers, until otherwise arranged for, and shall welcome as many new ones as can come.

THE MATTER OF T. WALLACE MORE.

We publish in this issue the *final decision*, (by the Secretary of the Interior,) in the long and fiercely contested case of T. Wallace More, in the matter of the "Sespe Rancho," in Ventura Co. of this State. The recent murder of Mr. More, and the lengthy trial of suspected persons, has become notorious throughout the land; and the manifest disposition of his family to connect it with the long and bitter land contest, renders it quite noted; and the points involved and decided in this their final effort, makes it one of the most interesting as well as important cases regarding Mexican Grants and Titles ever decided in this State.

We have, at some pains, arrived at the proved and accredited facts of the case, and give them in that connection, as fully as our limited space will permit.

We notice in a recent number of a prominent Daily of this city, an article headed—"LAND PURCHASE."—"One of the Bones of Contention between the late T. Wallace More and his Murderers."—and credited to the "Los Angeles Star"—which, while mainly fair and correct in its statements,—would seem to assume that the settlers, who had so successfully contested More's persistent claims, were an organized band of desperadoes; and it speaks of R. M. Widney of Los Angeles, as though he was the only attorney who acted for the settlers in the various battles of the "Sespe" campaign.

From the documents in our hands we find,

that while the efforts of the Hon. Mr. Widney were exceedingly able and meritorious, and rightfully won the case in the local Land office, and were well appreciated by his many clients, yet, that he was really only one of three powerful generals on that side of the fight.

Mr. Jas. F. Stuart, of our city, appears to have drawn up the plan of the campaign and guided its general conduct, and appeared personally at one time before the Department at Washington,—as well as by an able and exhaustive brief in the last contested appeal;—while Messrs. Luce & Johnson of Washington threw into the scale the full weight of their well known experience and ability, and undoubtedly contributed largely,—as their excellent brief fully shows,—to the meeting, and final overcoming of the strongly organized efforts made by the Mores in various ways at the Department in Washington.

Mr. Widney's keen and logical brief, filed before the Department, and containing a photographic map of the Rancho, showing all the boundaries of the various claims, must also have borne its full weight in the final decision.

The several briefs are before us, as well as a full statement of facts, compiled by Mr. Stuart, embodying translations of all the original records of the Mexican archives, bearing upon the case, and other documents from Washington, from all of which we gather the facts of the case.

HASTINGS LAW COLLEGE.

APPOINTMENT OF A PROFESSOR OF LEGAL ETHICS.

The Directors of the Law Department of the University of California have appointed Rev. William H. Platt to the chair of Legal Ethics of that School. Professor Pomeroy, in making the announcement, congratulated the class upon the appointment, observing that Mr. Platt combined the character of lawyer with that of clergyman; he had been admitted counsellor in the Supreme Court of the United States, and had made the ethical grounds of the law, and the application of the principles of morals to the practice of the law a special study. The Law School was, therefore, fortunate in securing this acquisition to the Faculty. Mr. Platt would deliver a course of lectures upon Ethics, and also on Criminal Law, regularly during the senior year; but, in addition to that, he would, from time to time, lecture on these subjects before the present class.

SUPREME COURT OF CALIFORNIA.

JULY TERM, 1878.

(Filed September 22, 1878.)

L. VILLAGO, Plff. and Resp't.
vs.
STOCKTON AND IONE R. R. CO. ET AL.,
Defendants and Appellants. } No. 5898.

Appeal from Fifth District Court, San Joaquin County.

Judge

CONDEMNATION OF LAND FOR RAILROAD USES—DAMAGES—UNDERTAKING IN SECURITY.—As provided in section 184, C. C. P.: Held that the said undertaking is void, as to being just compensation for the final taking of the property; and no recovery can be had upon it as an obligation at common law, it not being alleged that the undertaking was accepted in lieu of final payment, nor that the property was finally taken. And, damages sustained by preliminary taking not being averred, (and none being mentioned in the undertaking, except in case the land be not finally taken,) cannot be recovered; and no averment of its not being finally taken to show that any such damage has been sustained.

STATEMENT OF FACTS.

This is an action on a bond, given under Sec. 1264, C. C. P. in the condemnation of land for the use of the Stockton and Ione R. R. Co. The Company commenced proceedings in such condemnation on June 3, 1875, for certain lands of plaintiff and others, and entered into a contract and bond in writing, with E. S. Holden, W. G. Miller, and Robert K. Reid, as sureties, guaranteeing to the plaintiff any compensation and all damages that might be awarded to him by reason of the taking of the land, not exceeding the sum of \$4,500.

Under this, the R. R. took possession of the land; and referees, appointed by the court, to assess the value and damages, awarded \$900 50 to plaintiff, for which judgment was entered August 26, 1875.

That judgment is still in force, and no part has been paid, hence, plaintiff now demands the sum of \$1,600 50 as the full amount of the award.

Defendants claimed in answer that the Sec. 1264 is void, (Davis vs. San L. R. R. Co., 47 Cal., 517. San Mateo W. Co. vs. Sharpstein, 50 Cal., 266.) hence the order of court is also void, (Newell vs. Phelps, 3 Seld. 6. Bodman vs. Munson, 13 Barb 68.) and also as the object of the bond was to take possession before payment; (Civil Code, Sec. 1598-1607-1608. Benedict vs. Brady, 2 Cal., 251.) and the title never vested in the R. R. Co., as there was no payment made, nor any final order of condemnation. (Code C. P. Sec. 1263. And the defendants, as sureties, were not privies to the action, and hence not bound by the judgment. (Stoops vs. Woods, 45 Cal., 430. Pico vs. Webster, 14 Cal., 208.)

The cause was tried June 8, 1877, without jury, and judgment given for plaintiff, for \$1,081 46.

Motion for new trial was denied, whereupon defendant appealed from both the judgment and order.

Byers & Elliot, attorneys for plaintiff and respondent. *W. S. Montgomery* and *J. H. Budd*, for defendant and appellant.

BY THE COURT.

The undertaking upon which the action was brought, was given in proceedings instituted by the Railroad Company, for the condemnation of certain tracts of land, one of which was owned by the plaintiff, and was intended as the "security" provided for in Sec. 1254 of the Code of Civil Procedure, upon being authorized by the court, to have the possession and use of the lands during the pendency of the condemnation proceedings, the parties who executed the undertaking thereby promising that the Railroad Company should pay the compensation which might be awarded by reason of the taking of the lands, and all damages which might be sustained by the owner of the lands, if they should not be finally taken by the Railroad Company for public use. It is alleged in the complaint, that upon the filing of the report of the referees, in the condemnation proceedings, the court entered judgment in favor of this plaintiff against the Railroad Company, for \$900 50, for the value of the land taken, and the damages sustained by reason of the taking of the land, and for \$700 for the cost of building fences along the line of the Railroad. The breach alleged is, that no part of the judgment has been paid.

As a statutory obligation, the undertaking is void. It was held in *San Mateo Waterworks vs. Sharpstein*, 50 Cal., 284, and *Sanborn vs. Belden*, 51 Cal., 266, that an undertaking of this character did not constitute a "just compensation" in the sense of the Eighth Section of the First Article of the Constitution, for the taking of the property, upon the preliminary order of the court. This, then, being the settled doctrine of the court, it must necessarily be held that the undertaking will not constitute just compensation upon the final taking of the property.

Regarding the undertaking as an obligation at common law, no recovery can be had upon it, as the case now stands, for the just compensation to which the plaintiff would be entitled, upon the taking of the property, because it is not alleged that he accepted the undertaking in lieu of the payment to which he is entitled, upon the final taking of the property; nor is it alleged that the property was finally taken, nor is the just compensation to which he is entitled for the preliminary taking, averred. Nor can a recovery be had for the damages sustained by the preliminary taking,

because such damages are not averred, and for the further reason that the only damages mentioned in the undertaking are such as may be sustained, "if for any cause, the said described property, or any of it, shall not be finally taken" by the Railroad Company; and it is not averred that the property was not so finally taken, nor that by reason thereof, the plaintiff has sustained any damage. Judgment and order reversed, and cause remanded for a new trial.

(Filed September 23, 1878.)

A. HEWELL, Pl'ff and Resp't, }
vs. } No. 6005.
THOS. W. LANE, Dft and App't. }

Appeal from Fifth District Court, Stanislaus Co.
S. A. BOOKER, Judge.

MANDAMUS—SHERIFF'S RETURN—A Sheriff's return, after being placed on file, can be corrected only on his motion, and not against his will. He cannot be compelled to contradict his return. In this case he ought not to deliver such deed to respondent as purchaser, and should he do so it would be absolutely void.

A writ of mandamus cannot be resorted to for the compulsion of such a deed, where he not only declines to amend, but insists, in his answer, to be correct, in point of fact. The general rule is that should he voluntarily deliver a deed contradicting his return on file, the rights of the grantee would not be affected by the return.

STATEMENT OF FACTS.

This is a proceeding in *mandamus*, to compel the defendant, as Ex-Sheriff of Stanislaus county, to execute and deliver to plaintiff a deed for a certain tract of land which had been sold for delinquent taxes, and to recite in the deed that the sale was made to him as the bidder who offered to take the least quantity of land and pay the taxes adjudged due, and not as the *highest bidder*; or in other words, a deed different in character and effect from the tax deed as executed by him heretofore, and delivered to plaintiff; inasmuch as it does not truly recite the acts performed by the said defendant, in pursuance of the judgment and order of sale; for the sale, *in fact*, was made to the person who was willing to take the smallest quantity of land and pay the tax adjudged.

Defendant claims, in answer, that he made a *true return*.

The cause was tried on January 15, 1878, a jury being waived, and the court ordered a peremptory writ of mandamus to defendant to execute the deed prayed for.

From this, defendant appealed, and claims that he could not execute the deed commanded, because it would contradict and falsify his return and certificate of the sale. And the Sheriff's return is not *fraverrable* and is *conclusive* as to the manner in which said tax sale was made. (*Egery vs. Buchanan* 5 Cal., 54. *Gregory vs. Ford*, 14

Cal., 139. *Freeman on Execution*, Section 363.) And that the plaintiff, by *keeping* the deed of the officer for "nearly eight years" is now estopped from denying the truth of the recitals contained therein. (*French vs. Edwards*, 13 Wall., 515. *Dona-hue vs. McNulty*, 24 Cal., 413.)

The plaintiff claims that a purchaser at a Sheriff's sale is not bound by the return of the officer. His title rests on the judgment, execution, sale, and deed. (*Cloud vs. El Dorado*, 12 Cal., 130. *Blood vs. Light*, 38 Cal., 649. *Mayo vs. Foley*, 40 Cal., 261.)

D. S. Terry, Attorney for plaintiff and respondent; *Schell & Sorrensen*, attorneys for defendant and appellant

BY THE COURT.

The return of the Sheriff, as remaining on file, in the case of the *People vs. South half of Sec. 19*, shows that the land in question was in point of fact, sold to the respondent as being the highest bidder; ("to A. Hewell, who made the highest bid therefor,") and not as the person who would take the smallest or least quantity of the land, and pay the tax adjudged due. In view of the facts stated in the return therefore, the appellant, (who was the Sheriff who made the sale,) ought not to deliver a deed to the respondent, as purchaser, and should he do so, such deed would be absolutely void.

But the present proceeding is one in mandamus against the Sheriff, to compel him to deliver the respondent a deed of conveyance, reciting that the sale was made to him, not as the highest bidder, but as the bidder who offered to take the smallest quantity of the land and pay the taxes adjudged. In other words, to compel the Sheriff, by recital in the deed, to contradict his return on file, and the truth of which return he reiterates in this proceeding.

We are satisfied, however, that the Sheriff cannot be compelled, in this manner, to contradict his return. He cannot, it is well settled, be compelled by the court to correct his return on file against his will. After it has been placed on file it can be corrected only on his motion. It may be true, that should he voluntarily deliver a deed which, in its recitals, should contradict his return on file, the rights of the grantee would not be affected by the return—and such is the general rule. But it would be contrary to reason and the adjudicated cases to hold that a writ of mandamus can be resorted to for the purpose of compelling the delivery of a deed containing recitals of what occurred at the sale, contradictory of the Sheriff's return, which return he not only declines to amend, but insists in his answer to be correct in point of fact.

Judgment reversed and cause remanded.

(Filed September 24, 1878.)

LEWIS ADLER, Pl't and Resp't,
vs.
HENRY WINKLE, D'f and App't. } No. 5865.

Appeal from Twenty-second District Court, Sonoma County.

J. TEMPLE, Judge.

FRIVOLOUS APPEAL—DAMAGES.

STATEMENT OF FACTS.

An action to recover on three promissory notes—one each for \$2,500, \$1,000, and \$800—all dated January 1, 1875, and given to plaintiff in consideration of his sale to defendant of his one-third interest in the firm of "Henry Winkle, & Co."

Defendant admits the notes, but files a cross-complaint, that in July, 1876, he sold plaintiff 2,940 gallons of wine, at 25 cents per gallon, (\$735) for which he gave him no credit, and in March, 1875, he sold plaintiff goods to the value of \$415 80, which was not paid nor credited to defendant. That it was agreed between them that, in case defendant could not collect his portion of the outstanding debts to the firm, he (plaintiff) would reimburse defendant, and that \$1,000 of accounts was worthless and uncollectable, so plaintiff is justly indebted in that sum.

All this plaintiff denies. Cause was tried June 26, 1877, without jury, and the court gave judgment for plaintiff for a balance of \$2,390—(plaintiff having moved the court on May 11th, to strike out certain parts of the cross-complaint on the ground of irrelevance and sham, which was sustained.)

Defendant appealed from the judgment on September 24, 1877, assigning error in striking out said cross-complaint, and in judgment.

Rutledge & McConnell, attorneys for plaintiff and respondent; *Johnson & Henley*, for defendants and appellants.

BY THE COURT.

The appeal is frivolous. Judgment affirmed with ten per cent. damages. Remittitur forthwith.

SUPREME COURT RECORD.

[JULY TERM, 1878.]

CASES CONTINUED—Sept. 24th. No. 5970

—Low vs. Mahe—For the term, upon suggestion of the death of Gustav Mahe, defendant and appellant.—and motion of S. M. Wilson, of his Counsel.

REHEARING.—Sept. 27th. No. 5545—Wills vs. Austin; 5547—Mahe vs. Austin; 5548—

McCarthy vs. Austin; 5550—Teschmacher vs. Austin—Petitions filed for,—on motion of Merrill and Patterson for Respondents, and stay of proceedings granted.

No. 3341—Hillard vs. Pacheco—Petition filed for,—on motion of Evans and Bishop for Appellant,—and stay of proceedings granted.

No. 4964—Robinson vs. Gleeson—Denied.

No. 5869—Wanser vs. Somers—Denied.

No. 5191—Keller vs. Lewis—Denied.

No. 6025—Ybarra vs. Lorenzana—Denied.

No. 5794—Wiggins vs. McFarland—Denied

ADMITTED TO PRACTICE—Sept. 24th John W. Jefferson,—on motion of J. E. McElrath, and license from Tennessee.

Sept. 25th Thos. E. Steven,—on motion of Jno. T. Doyle, and license from Supreme Court of Missouri.

U. S. SUPREME COURT MANDATE.

No. 3659—Atherton et al. vs. Fowler et al.

WHEREAS, At the July term, 1873, of this Court, a judgment was made and entered in this Court affirming the judgment heretofore rendered in said cause in the District Court of the Fourth Judicial District, and the remittitur of this Court was thereafter duly issued to said Court and filed in said cause; and

WHEREAS, The said appellants thereafter sued out a writ of error to the said judgment of this Court, and removed said cause for review into the Supreme Court of the United States; and

WHEREAS, Said Supreme Court of the United States, at the October term, 1877, of said Court, rendered a judgment in said cause on said writ of error; and thereupon issued its mandate to this Court reversing the judgment therefor rendered by this Court affirming the said judgment of said Fourth District Court as aforesaid, and further instructing this Court to order a new trial in said action; and

WHEREAS, Said mandate of said Supreme

Court of the United States has been filed herein,

On motion of Chas. Page, Esq., of counsel for appellant in said cause, it is ordered that the judgment heretofore entered in this Court in said cause at the said July term thereof in the year 1873, be and the same is hereby in accordance with the said mandate vacated and set aside; and it is further ordered that the said judgment of said Fourth District Court and the order of said Court denying the plaintiffs' and appellants' motion for a new trial in said cause be and the same are hereby reversed, and the sa cause remanded with instructions to set aside the judgment and order of affirmance heretofore made in said cause, and to grant a new trial therein, and that appellants recover their costs in the Supreme Court of the United States, taxed at \$114.27.

And it is further ordered that the remittitur herein issue forthwith.

U. S. Land Decisions.

T. WALLACE MORE, Claimant and Applicant,
vs.

S. A. GUIBERSON, and some 70 other Pre-emptors, as Settlers and Contestants.

Under Sec. 7, Act of July 23, 1866.

Appeal from the COMMISSIONER of the GENERAL LAND OFFICE to the SECRETARY of the INTERIOR.

SEEPER RANCHO—VENTURA COUNTY.

Application to Purchase the Balance of a Claim of 6 Square Leagues, after 2 Square Leagues had been Patented to Claimant.

STATEMENT OF FACTS.

On November 29, 1833, Carlos Antonio Carrillo, a member of the "Committee on Colonization and Vacant Lands" of the Territorial Government of California by Mexico, received from the Governor, Jose Figueroa, a grant of 2 square leagues of land, "called Seepe," lying between the Missions of San Fernando and San Buenaventura, in what is

now Ventura County.

This grant was written out in *duplicate*, signed by the Governor and Secretary, recorded in the Record Book of Grants, and one, as the original, delivered to Carrillo, and the other deposited in the archives of the Government, as was usual in such cases.

On May 12th, 1839, Carrillo prepared a full copy of his original grant and the accompanying papers in his hands, certified to by the Justice of the Peace of Santa Barbara, with a petition to the President of Mexico, and sent them to the Governor of California for transmission to Mexico, for approval and confirmation of his grant of 2 square leagues.

But the grant was never confirmed by the Supreme Government at Mexico, and these papers all lie in the Mexican archives of this city to-day—as prepared by Carrillo.

Upon California's becoming a part of the United States, and the meeting of the Board of United States Land Commissioners appointed to settle land claims,—and during their session,—on Sept. 2d, 1852,—Carrillo laid before them his original grant of *dos*, or two square leagues *fraudulently altered to seis*, or six leagues, accompanied by papers pretending to be a survey and juridical possession of the same, in 1842, and they, deceived thereby, confirmed the grant for the six leagues.

After this confirmation Carrillo died, intestate, and on November 8th, 1854, the administrator of the estate sold at public auction, the *right and interest* of "Josefa Castro de Carrillo" in and to an undivided 13-14ths of the "Sepe Rancho," which was bought by T. Wallace More; and on May 14th, 1855, the administrator, again sold, in like manner, the *interest and estate* of "Carlos Antonio Carrillo," in the remaining 1-14th of the same,—which More also bought—having now paid \$18,500 for his whole purchase, and claiming to understand that he had bought *six square leagues of land*, though he afterward testified that he did not examine a single paper or record connected with the grant before he purchased.

By the express terms of the original grant, no legal survey could ever have been made of the lands,—as was claimed to have been made in Dec., 1842, (the grant not having been confirmed by the Supreme Government of Mexico); hence there had never yet been any *established boundaries* of "Sepe,"—and it was consequently only a "*floating grant*," attaching to no definite land, when the question of title came before the U. S. District Court on June 25th, 1862.

Here it was fully proved by the record,

and *duplicate copy* of the grant on file in the archives, that the grant was really *only 2 leagues*, and More, with his attorney, A. F. Hinchman, then fearing a rejection of the whole claim for the fraud discovered, voluntarily filed an admission of the change, and reduced his claim to two leagues, which the Court finally confirmed to him—the U. S. Attorney appealing to the U. S. Supreme Court, as to whether the *whole* claim should be *rejected* for the *fraud*. This appeal was dismissed, and the decision affirmed, and More, with his own hands presented the mandate of the Supreme Court to the District Court, which thus confirmed the 2 leagues to More, as under final decree, which was filed Dec. 4th, 1867.

More now had a scope of country of about 40 English miles from east to west from which to select and locate his 2 leagues—with no restriction north and south, named in his papers; and in January, 1868, the Deputy Surveyor returned to the Surveyor General's Office, two surveys, one embracing 25,361 acres, in a body, (which included 5,780 acres of the river bed,) and the other 8,881 acres in two tracts, one each side of the Santa Clara River, with a wide tract of river bed between.

The *larger* was first sent to the Commissioner of the General Land Office, apparently with the intention of covering 5 leagues instead of two,—as is evidenced by a letter from that officer to the Surveyor General here. This was rejected as a *fraudulent survey*, and then the other one, of two tracts, was brought forward, with affidavits that the bed of the river (between the tracts) was mostly sand, and worthless.

The map of this survey, as to the river bed, was marked 80 chains to the inch, while it was surveyed at only 40, thus making it appear twice its real width, and when this discrepancy was discovered, at the Department, proceedings were suspended, while the map was returned to California for correction.

The records show that More had, previously to filing the mandate and final decree, made a deed to the chief clerk in the U. S. Surveyor General's office of all the mines, minerals, asphaltum, etc., on the Sepe Rancho—"embracing the lands to be segregated by the United States"—and that now, he made a contract with certain Washington attorneys, as per the following quotation—"More paid us a retainer of \$500 coin, and agreed to pay us a further fee of \$500 coin upon issue of his patent, and a still further fee of \$500 coin upon our securing for him a title to any lands which

were included in his original purchase, but which might be left out of his patent."

This being brought to the notice of the Secretary of the Interior, by James F. Stuart of our city, in person, he had all lands outside of the survey of two leagues,—whether in the bed of the river or otherwise—*excluded* from the patent, "by the most positive words that could be used." This patent, issued March 14, 1872, *saved* to the United States and the *settlers* several thousand acres that More would have otherwise claimed and secured on the ground of riparian rights.

Following this, the lands outside the patented tracts were taken up as government lands, by actual settlers, until some 70 or more had made claims, when on March 18, 1875, More applied at the local land office at Los Angeles to purchase all the lands within the formerly claimed limits of the rancho, and not within his patent, under the act of July 23d, 1866.

The case was heard May 18, 1875, when the officers decided that the 2 leagues patented to More was the *full extent* of his purchase in the "Sespe Rancho," and that none had been excluded, to which he could be entitled under the act, as claimed; and that to do so would open the way to "the most gigantic frauds"—and the application was *REJECTED*.

From this decision More appealed to the Commissioner of the General Land Office, and, on July 18th, 1877, U. J. Baxter, acting commissioner, reversed the decision of the local office, and gave More the right to purchase all the lands, as applied for, except those in the river bed. From this decision the contesting settlers appealed to the Secretary of the Interior; and the heirs of More appealed from its exclusion of the river bed.

At this trial, the settlers again employed R. M. Widney, of Los Angeles, who had acted so successfully for them at the hearing at Los Angeles.

He prepared and filed with the Secretary an able brief, illustrated by a map showing all the lines and claims in the whole matter.

Mr. Stuart also prepared a most exhaustive brief and argument, covering the whole ground, and also secured at Washington the services of Messrs. Luce & Johnson, a firm of well known experience and ability, who also prepared an excellent brief and argument, and represented the whole matter at the Department.

Pending the decision of this appeal, certain members of the More family issued a pamphlet purporting to be a "Statement of Facts, as to the Rancho Sespe," etc., which was printed

at Washington, and circulated both there and in Ventura county, and plainly *appeared* to be *intended* to influence such decision, and the murder trial then pending at San Buenaventura.

In reply to this, Mr. Stuart at once published "A Statement of Facts" of the *whole matter*, fortified on every point by reference to original records and documents, and which in our opinion shows a series of attempted frauds, trickery and chicanery, that has rarely been equalled in the whole history of our State.

The *main* points presented and relied upon by the counsel for the settlers, and pressed by Mr. Stuart with unflinching earnestness, were that the original grant was for 2 square leagues of land, *to be selected* within larger exterior boundaries of six leagues or more, and that having never been so selected and segregated, the grant was—as designated by the U. S. Supreme Court—"a floating grant"—*attaching to no definite land*, until the final survey and segregation by the Government; hence that More did not purchase any particular *land*, but simply a *right* to 2 square leagues *to be located* for him by the Executive Department of the Government.

The only difference between the grant and a School Land Warrant issued under the 500,000 acre grant to California was that the warrant had the whole State for selection, while the grant was confined to *narrower limits*.

That, upon More's obtaining his patent to the two square leagues, his title covered all the land he really ever bought, and hence the Act of Congress of July 23, 1866, did not and could not apply to his present claim.

The following authorities were cited to sustain these points:—

In the case of Kissell v. St. Louis Public Schools, 18 Howard, [U. S.] 25:—"Our opinion is, that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established any conclusive boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the Government. The case of West v. Cochran, 17 How., 413, lays down the dividing line between the executive and judicial powers in such cases, to wit: That until a designation, accompanied by a survey or description, was made by the Surveyor General, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

"The law is settled, that where there is a

specific tract of land confirmed according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment. The case of (*Bissell v. Penrose*, 8 Howard, 317), lays down the true rule. But where a claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed, and severed from the public domain and the lands, of others, then it is not open to controversy, that the title attaches to no land; nor has a court of justice any authority in law to establish its boundaries, this being reserved to the Executive Department. The case of *West v. Cochran*, 17 How., 403, need only be referred to as settling this point." The other authorities were (*Stanford v. Taylor*, 18 How., [U. S.] 412; *Fremont v. United States*, 17 How., [U. S.] pp. 558 to 560; *Schulenberg et al. v. Harriman*, 21 Wallace, [U. S.] 44-45; *Langdon v. Hanes*, 21 Wallace, 526; *Henshaw v. Bissell*, 18 Wallace, [U. S.] 266-7; and case of *John L. Van Reynegan et al. v. James C. Bolton*, recently decided by the U. S. Supreme Court, *Copp's Land Owner*, for Dec. 1877, pp. 137-8.)

The decision, (against heirs of More) is appended in full—as given in *Copp's Land Owner* for August, 1878.

PRE-EMPTIONS.

HEIRS OF T. WALLACE MORE.

Where a Mexican grant is of quantity within larger exterior boundaries, and the claimant has selected and had patented to him the quantity granted and confirmed, he will not be allowed to purchase, under the 7th section of the Act of July 23, 1866, any of the lands not selected within the exterior boundaries of the grant.

Where grants were made not of quantity but by specific boundaries, and the claimant has occupied lands (through some mistake or misapprehension) not included within such specific boundaries, he may purchase under the 7th section of said act the lands so occupied, which were excluded from the grant on final survey, if no adverse claim thereto exists except of the United States.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, July 25, 1878.

SIR: I have considered the application of the Heirs of T. Wallace More, to purchase under Section 7 of an Act of Congress, approved July 23 1866 entitled: "An Act to quiet Land Titles in California," certain lands in township 3 N. 18W.; 4N. 18W.; 3 N.

19 W.; 4 N. 19 W.; 3 N. 20 W.; 4 N. 20 W.; 3 N. 21 W.; and 4 N. 21 W.; S. B. M. Los Angeles Land District, California, on appeal from your decision of July 18, 1877.

The facts of this case are substantially as follows, viz.: On May 23d, 1829, Carlos Antonio Carrillo, petitioned the Mexican government for a grant of the "place called Sespe," describing the tract applied for as a valley extending from the Arroyo of "Piruc" to that of "Mupu," an estimated distance of about four and one-half leagues, the width of the valley being about three-quarters of a league in the clear. Petitioner also stated that a large portion of the valley was an *arenal* (the wide sandy bed of the Santa Clara River which flowed through the valley), and worthless; the only land of value being that lying between the edges of said *arenal* and the hills on each side.

After the usual proceedings had been taken on the petition by the proper authorities, a grant was issued to the petitioner on November 29, 1833, by Jose Figueroa, Superior Political Chief, etc., "for the Territory of Alta, California, for the land known by the name of Sespe," "bounding with the missions of San Fernando and San Buenaventura," and limited in extent as follows:

"The land of which donation is made is of the extent of two square leagues, (dos sitios de granada mayor) a little more or less, as shown by the map (diseno) in the expediente. The Judge who may give possession will cause the same to be measured in accordance with the ordinances for the marking boundaries, the surplus that may result to remain for the use of the nation."

This grant was approved by the Territorial Deputation, on May 17, 1834, and judicial possession thereof given to Carrillo, by the proper officer on December 16, 1842. It appears that in making the survey, the officer measured but two lines, one for the length of the tract and one for the width. The line for the length was measured from the Arroyo "Mupu" to that of "Piruc" something over five and one-half leagues; and the one for the width of the valley, something over one league; the surveyor estimating the area of the tract at between five and six square leagues.

This grant was presented by Carrillo to the Board of United States Land Commissioners, created by act of Congress, approved March 3, 1851 (9 Stats. p. 631), to ascertain and settle private land claims in California, and was confirmed by said Board on April 18, 1853.

The decree of confirmation is as follows:

"It is decreed that the said claim be confirmed to the claimants, to the extent and quantity of *six square leagues* or sitios de granada mayor, being the same land described in the grant and expediente referred to therein, and of which possession has been had and enjoyed under the same, provided that the said quantity of land granted and now here confirmed, be contained within the boundaries called for in said grant, and map to which the grant refers, and if there be less than the above named quantity within the said boundaries, than we confirm to the claimants that less quantity."

Carrillo died (the exact date is not known) and his estate was administered upon in the Probate Court of Santa Barbara County, and a sale of the real estate was ordered for a distribution of the proceeds between his heirs-at-law. The Sespe grant was accordingly sold at Administrator's sale; 13-14 on Nov. 8, 1854, and 1-14 on May 14, 1855, Thomas W. More, became the purchaser thereof for the sum of \$18,500. These sales were subsequently confirmed by the Probate Court and deeds were regularly executed by the Administrators and delivered to Mr. More.

In the published notices which preceded said sales, the Sespe grant was described as containing about six square leagues, but the conveyance by the Administrators to More do not state the amount of land conveyed; the description of the property being confined to the name of rancho and the county in which it is located.

A petition for review of the decision of the Board of Land Commissioners was filed in the United States District Court, by the United States District Attorney, on December 29, 1854, and a summons was issued to the heirs of Carrillo to appear and defend said action on Feb. 1, 1855, and service was perfected by the Marshal on March 1, 1855, on Oct. 18, 1855, the name of Thomas W. More, was substituted by order of the court, as the party appellee in place of the heirs of Carlos Antonio Carrillo, it being shown that he had become the owner of the grant after the decree was rendered by the Board of Land Commissioners.

On Feb. 5, 1856, A. F. Hinchman, attorney for More, filed the following stipulation in the United States District Court, viz: "It is admitted by the claimants in the above entitled cause, that the grant of land claimed in this case as originally delivered to Carlos Antonio Carrillo, was for *two square leagues of land*, the quantity granted as shown in the

copy of the expediente as filed in this case, and not for *six square leagues*. And it is further admitted by said claimants that the said original grant was altered by rasure from *two to six square leagues after the time of its execution and delivery to said Carlos Antonio Carrillo without the knowledge or consent of the governor or other officers of the late Mexican Government, in California.*"

More testified that this stipulation was filed without his knowledge or consent, and that he never believed that the grant was fraudulently changed. The original records of the Mexican Government, however, show conclusively that it was so altered, and More is now estopped from denying the act of his attorney.

The reasons why this stipulation was filed are explained in a report made by Surveyor General Day to your predecessor, Mr. Commissioner Wilson, dated May 22, 1869, wherein he says: "I have conversed with Mr. Hinchman, who now lives here. He says that Judge Ogier, was fully aware of the attempted fraud, and *frowned upon any attorney who attempted to ask for a confirmation of it.* At the same time he expressed a willingness to confirm the title for two leagues. Hence the admission of Hinchman, whose client had become satisfied to take one-third of a loaf rather than get no bread. The matter was left unfinished when Judge Ogier died, and it had to be re-argued before Judge Haight. Colonel Whiting then District Attorney, argued the case for the U. S., and he tells me that the facts were fully developed before Judge Haight, whose opinion coincided with that of Judge Ogier, and a decree was rendered for two leagues instead of the six confirmed by the Land Commissioners."

"On examining the original grant on file in this office, I find the word '*seis*' accompanied by signs of some kind of alteration, whether by mechanical erasure or by chemical process does not distinctly appear."

"The hand writing of the word '*seis*' does not agree with that of the rest of the document. The original barrador or office copy of the grant kept by the Governor's Secretary, has the word '*dos*' unaltered. So has also the old copy in the record book of titles."

Said grant was confirmed by the U. S. District Court on June 25, 1862, for two leagues, the decree describing the lands confirmed to be as follows, viz: "The lands hereby confirmed are those known as 'Sespe,' situated in the county of Santa Barbara, in

the southern district of California, and are of the extent of *two square leagues* within the boundaries called for in the grant and expediente referred to therein; said boundaries being described as follows, to wit: bounded by the missions of San Fernando and San Buenaventura, provided, that should there be less than two square leagues within said boundaries, then confirmation is hereby made of such less quantity."

On Jan. 12, 1866, the U. S. Supreme Court dismissed the appeal in said case and issued a mandate to the District Court to proceed under the judgment of June 25, 1862, as under final decree.

This mandate was filed and entered on record in the District Court on December 4, 1867.

The survey of this grant was made by Deputy Surveyor Hoffman in Jan. 1868, and a plat thereof transmitted to your office on June 17, 1838.

By this survey said grant was represented as containing 25,360 96-100 acres, including 5,780 29-100 acres of the sandy river bed or arenal.

This survey was rejected by acting Secretary Cowen, on July 31, 1871, and a new survey ordered. A new plat of survey was returned by the Surveyor General in December, 1871, by which the grant was located in two tracts: tract number one containing 3, 086 83-100 acres and tract number two containing 5,793 98-100 acres, making a total of 8, 880 81 100 acres. This survey was approved by your predecessor, Mr. Commissioner Drummond, and patent issued thereon March 14, 1872.

On March 18, 1875, More applied to purchase the lands formerly within the claimed limits of said rancho, which were not included in the final survey.

You decided that the plat of the Sespe Rancho, returned by the Surveyor General in 1868, correctly defined the out-boundaries of the grant, and that More (his heirs or assigns) were entitled to purchase all land not included in the final survey of the grant within said boundaries, except the tract lying within the arenal or sandy river bed.

The heirs of More have appealed from so much of your decision as rejects their right to purchase the sandy lands; and the settlers whose claims are affected by your decision, have appealed from so much thereof as awards to the heirs the right to purchase any of the lands in question.

The statute under which this application is made is in the following words viz.:

"That where persons in good faith and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the U. S.) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the Commissioner General Land Office, joint entries being admissible by co-terminous proprietors to such an extent as will enable them to adjust their respective boundaries; *Provided*, that the provisions of this section shall not be applicable to the City and County of San Francisco. *Provided*, that the right to purchase herein given shall not extend to lands containing mines of gold, silver, copper or cinnabar; *Provided*, that whenever it shall be made to appear by petition, from the occupants of such land that injury to permanent improvements would result from running the lines of the public surveys through such permanent improvements, the Commissioner General Land Office may recognize existing lines of subdivision." (14 Stat. p. 220.)

It will be observed that the claimants entitled to purchase under this section, are divided into two classes, vi. z.:

First. Those who in good faith and for a valuable consideration have purchased lands from Mexican grantees or assigns, which grants have been subsequently rejected, and have used, improved and continued in actual possession of the lands according to the lines of their original purchase.

Second. Where the lands purchased as above have been excluded from the final survey of any Mexican grant, and the claimant has used, improved and continued in actual possession thereof, according to the lines of his original purchase: *Provided*, in both cases, that the lands are not mineral in character, and there was no valid adverse right or title thereto (except in the U. S.) at the date of the act, or in case of final rejection or determination of the limits of the grant after the passage of the act, at the date of such rejection or determination. In order to bring the case within the first class, the grant as claimed must have been rejected,

not in part, but entirely. The word "rejected" is not a word of great elasticity nor of doubtful meaning, either in common parlance or in legal signification, and as used in this statute, it means a legal determination adverse to the claim as presented by the tribunal before whom the claim shall be presented for final adjudication. And while it is immaterial for what reason the grant is rejected in order to give the claimant the right to purchase under said section, the quantity of the land purchased in good faith and for a valuable consideration, from the Mexican grantee, or his assigns, still that right does not exist under this provision unless the grant has been rejected. As this grant was not rejected, but on the contrary was confirmed and satisfied for the full amount granted by the Mexican Government, it is obvious that the claimants do not belong to the class first mentioned and have no right to purchase any lands described in the application on that ground.

Have they a right to purchase said lands by reason of the provision granting the right to purchase "where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved and continued in actual possession of the same as according to the lines of their original purchase?"

The answer to this question must depend upon the fact, whether any lands have been excluded from the final survey of said grant.

In order to determine that fact, an examination of the record, the history of this case, and the acts of the ancestor of the claimants in relation thereto is necessary.

The question of the survey and location of this grant came before my predecessor, Hon. C. Delano, in 1871, on an appeal from the decision of Mr. Commissioner Drnmond, rejecting the survey thereof, made under the direction of the Surveyor General of California, in 1868, which survey included 25,380 96-100 acres of land.

The decision of the Commissioner rejecting said survey for the reason that it embraced more than the two square leagues confirmed to More, was affirmed by Departmental decision dated July 31, 1871, based upon the opinion of Assistant Attorney General Smith, dated July 25, 1871. (Copp's Land Laws, p. 529.) It was also held that as the grant as confirmed was a grant of quantity within larger exterior boundaries, the claimant as the assignee of a Mexican grantee, had the right to select and have located the quantity confirmed to him any-

where within those exterior boundaries, in compact form if practicable, and if impracticable to locate the same in a compact form in one tract, then in separate tracts, each separate location being made as near as possible in a compact form.

In accordance with that decision, the grant as confirmed was surveyed and located within the exterior boundaries of the calls of the grant, in two separate tracts, aggregating in quantity two square leagues of land. The survey of the grant as thus made and located, was approved by your predecessor, and patent issued thereon to Thomas W. More, on March 18, 1872.

The right of a claimant to select the quantity of land confirmed to him anywhere within the exterior boundaries of a Mexican grant, was distinctly recognized in the Departmental decision of July 31, 1871, based upon the authorities cited, and inasmuch as no objection by Mr. More, appears to have been raised to the latter survey, or the acceptance of the patent issued thereon, it must be presumed that he exercised this right of selection and was satisfied therewith.

From this brief review of the facts I think it clearly appears that no lands were excluded from the final survey of this rancho. The claimant had the right of selection and did select within the exterior boundaries of the calls of the grant, the full quantity of land confirmed to him, and although it is true that an area of two square leagues will not cover an area of six square leagues, still it does not follow that, because the whole quantity is not embraced within the survey, or patent of the lesser quantity, that any lands not thus selected are excluded from the final survey.

In the selection of the quantity confirmed within larger exterior boundaries, it must always happen that some lands used and occupied by the claimants are not included within the selection and survey, and to hold that the mere fact of such use and occupation for any purpose or in any manner, gives the claimant the right to purchase the land so used and occupied would extend the provisions of said act so as to permit the claimant to purchase any and all lands included within the exterior boundaries of the calls of the grant claimed by him. It may be true where grants were made not of quantity, but by specific boundaries, and the claimant has occupied lands through some mistake or misapprehension, not included within such specific boundaries, that he would have the right to purchase under said section the land

so used and occupied after final survey of the grant had been made, and the tract so occupied had been excluded from such survey upon discovery and identification of the land-marks named in the calls of the grant. This right, however, does not extend to grants of quantity within larger exterior boundaries. The reason which would warrant the construction in the one case does not exist in the other.

In the Act of March 3, 1851, providing a system for the settlement and final adjudication of Spanish and Mexican grants in the State of California, a reservation was created of all the lands embraced within the claimed limits of every Mexican grant valid or invalid although the grant in fact, and in almost every instance, was of a quantity much less within the tract so reserved. These large tracts have been used and occupied, pending the final adjustment and satisfaction of the grant under such reservation by claimants, since that time, in, order to protect their rights, as well as to secure the benefits arising from the use of large tracts of lands.

Upon the adjustment, however the grant of quantity within larger exterior boundaries I am not aware that in any instance the claimants have sought or at least been allowed by the provision of the law under which this claim is presented to purchase any portion of the lands so reserved, not embraced within the grant as finally adjusted and I see no reason in this case for adopting a different rule from that which has been applied and accepted as the proper construction of said act in other cases.

It is true that this act is remedial in character, and, as such should have such liberal construction as will afford the relief intended by Congress to be granted, but while this is true, it must not be so construed, liberally or otherwise, as to embrace cases not contemplated by its provisions.

In the cases of *McGarrahan vs. the Secretary* (9th Wallace p. 298), the Supreme Court clearly indicated the opinion that the act is not to be extended to any cases except those which are brought by the proofs clearly within its provisions. In other words, that it must be extended only to cure the mischief sought to be remedied and afford relief in those cases, where without it, the parties would be remediless.

In this case, the proofs show that Mr. More occupied and used all of the lands embraced within the exterior boundaries described in the calls of the grant. His purchase however, was the interest which the heirs of

Carillo had in the "Sespe Rancho" and nothing more. The deeds did not state that six square leagues of land were conveyed thereby, but on the contrary, they mentioned and conveyed the interest which the heirs possessed in the "San Challetano" or "Sespe Rancho," situated in the "County of Santa Barbara in the State of California," without further designation or description of quantity or limits. That interest, as it was finally determined by the Court, consisted of the grant of two square leagues of land, which, as above stated, was selected by him and for which he received a patent in his lifetime.

To permit More, if living, or his heirs or legal representatives now to purchase from the Government, under the provisions of said section, the balance of the land embraced within the exterior boundaries of said grant, would, in my opinion, be a very dangerous precedent, and not warranted thereby.

Owing to the peculiar circumstances connected with this case, if they could be considered as bearing upon the question at issue, I should be disposed to allow the application of the heirs of More to purchase said tracts, if such application could be allowed in any case, to purchase lands within the exterior boundaries not selected, in satisfaction of the quantity granted, but in my opinion such an application cannot be allowed in any case under the provisions of the 7th section of the act of July 23, 1866.

Your decision, therefore, allowing the heirs of More to purchase any of the tracts embraced within the exterior boundaries of the "Sespe Rancho," is hereby reversed and the papers transmitted with your letter of December 5, 1877, are herewith returned.

Very respectfully, C. SCHURZ,

Secretary.

Commissioner General Land Office.

Book Notice. and Review.

"LAW OF MECHANICS' LIENS" OF CALIFORNIA —with explanatory remarks. For mechanics, and material men. This accurate, complete, and valuable work, of 32 Pages, has just been handed us by the authors, Messrs York and Clement, of the San Francisco Bar;—and we can safely recommend it to all who need such a work, as reliable, and with a full supply of the proper forms, for use. Furnished by the RECORD OFFICE—price only 50 cents.

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